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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 347. 57

W. S. GURNEE, JUNIOR, AND A. C. GURNEE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF PATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED JULY 9, 1887.

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1 Pleas before the circuit court of the United States for the western district of Virginia, at Harrisonburg, in said district, on the 2nd day of May, 1887, Hon. John Paul, judge of the district court, sitting alone.

W. S. GURNEE, Jr., & AUGUSTUS C. GURNEE, Citizens and Residents of the State of New York, Plaintiffs,
vs.
THE COUNTY OF PATRICK, in the State of Virginia, Defendant.

Be it remembered that heretofore, to wit, on the 6th day of May, 1884, before said court, at Harrisonburg, on the 6th day of May, 1884, came the plaintiffs, by counsel, and on their motion the following order was entered, to wit:

WALTER S. GURNEE, Jr., & AUGUSTUS C. GURNEE, Plaintiffs,
vs.
THE COUNTY OF PATRICK, Defendant.

This suit having been removed from the county court of Patrick county, in the State of Virginia and within the western district of the United States for the State of Virginia, upon the 2 petition of the plaintiffs, as citizens of the State of New York, it is, on the motion of the plaintiffs, ordered that this action be docketed in this court for further proceedings therein, as required by the act of Congress in such case provided, and that the record thereof be filed with the clerk of this court, which is done accordingly; and thereupon leave is given to the plaintiffs to file a declaration setting forth, as they may be advised, the grounds of their action, and that a copy of said declaration be served on the defendant at least ninety (90) days before the next term of this court, and that said defendant be required to appear, demur, and plead to said declaration at the next term of this court.

Which record from the county court of Patrick, in the State of Virginia, is in words and figures as follows, to wit:

VIRGINIA:

Proceedings had before the county court for the county of Patrick, at the court-house thereof, on the 29th day of April, 1884.

Be it remembered that at a county court held for the county of Patrick, at the court-house thereof, on the 29th day of April, 1884:

3 WALTER S. GURNEE, Jr., & AUGUSTUS C. GURNEE, Plaintiffs,
vs.
PATRICK COUNTY, Defendant.

On an appeal from a decision of the board of supervisors of Patrick county rendered at their regular meeting, held at the court-house thereof, on the 7th day of April, 1884, disallowing the plaintiffs' demand for the payment of interest due on seventeen thousand dollars ($17,000.00) on bonds issued by said county to the Norfolk and Great Western Railroad Company and claimed by the plaintiffs as *bona fide* holders or a levy for the interest thereon to the first day of November, 1883, said bonds numbered, respe-tively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, & 30.

This day came the parties, by their attorneys; and thereupon the appellants, by counsel, filed their petition, with affidavits attached, under act of Congress of the United States regulating the removal of causes from the State to the United States courts; which petition and affidavits are in the following words and figures, to wit:

To the honorable judge of the county court of Patrick county, in the State of Virginia:

Your petitioners, Walter S. Gurnee, Jr., and Augustus C. Gurnee,
respectfully show that they are appellants or plaintiffs in a
4 certain suit or proceeding instituted by them against the
county of Patrick, in the State of Virginia, and which is
pending in your honorable court, and was commenced on or about the 7th day of April, 1884; that your petitioners were at the time of the commencement of said suit or proceeding and still are citizens of the State of New York and residents thereof; that said suit or proceeding was instituted for the purpose of enforcing the collection and securing the payment of a large amount of money due and owing to your petitioners, to wit, the sum of twenty-one thousand dollars, or about that sum, for interest in arrear and due to your petitioners on seventeen bonds, of one thousand dollars each, issued by said county of Patrick, of which your petitioners were at the time of commencement of said suit or proceedings and now are the *bona fide* holders for value, and that the matter in controversy between your petitioners and said county of Patrick exceeds the sum of five hundred dollars.

Your petitioners state that the said suit or proceeding has not been tried, but is pending for trial for the first time at the next term of the county court of Patrick county aforesaid, and that your petitioners desire to remove the same into the circuit court of the
5 United States for the western district of Virginia, in pursu-
ance of the acts of Congress in that behalf provided; and your petitioners further say that they have filed herewith the affidavits required by the act of Congress in such cases; and they offer here a bond executed by themselves, with good and sufficient sureties therein, in the penal sum of —— dollars, and pray the said bond may be accepted as good and sufficient, and that the said suit or proceeding may be removed into the next circuit court of the

United States in and for said western district of Virginia pursuant to the statute aforesaid, and that no further proceedings may be had therein in this court; and, as in duty bound, they will ever pray, &c.

W. S. GURNEE, JUN'R,
A. C. GURNEE, *Plaintiffs.*

STATE OF NEW YORK,
County & City of New York,

I, John C. O'Connor, a notary public in and for the county and city of New York, in the State of New York, do certify that A. C. Gurnee, whose name is signed to the foregoing petition, personally appeared before me in my county and city aforesaid and acknowledged the same to be his act, and, being duly sworn by me,
6 doth say that he is one of the plaintiffs in the proceeding or suit mentioned in said petition, and that he has reason to believe and does believe that from prejudice and local influence the plaintiffs in said proceeding or suit will not be able to obtain justice in the county court of Patrick county aforesaid.

A. C. GURNEE.

Subscribed by the said A. C. Gurnee in my presence and by him sworn to before me, at my county & city aforesaid, this tenth day of April, 1884.

Witness my hand & notarial seal this tenth day of April, 1884.

J. C. O'CONNOR, JR., [Notarial seal
Notary Public, N. Y. Co. here.]

STATE OF VIRGINIA, } *To wit:*
Page County,

I, S. J. Richey, a notary public in and for the county of Page, in the State of Virginia, do certify that Walter S. Gurnee, Jr., whose name is signed to the foregoing petition, personally appeared before me in my county aforesaid and acknowledged the same to be his act, and, being duly sworn by me, doth say that he is one of the plaintiffs in the proceeding or suit mentioned in said petition, and that he has reason to believe and does believe that from prejudice and local influence the plaintiffs in said proceeding or suit
7 will not be able to obtain justice in the county court of Patrick county aforesaid.

W. S. GURNEE, JR.

Subscribed by the said W. S. Gurnee, Jr., in my presence and by him sworn to before me, in my county aforesaid, this 21st day of April, 1884.

Witness my hand and notarial seal this 21st day of April, 1884.

[NOTARIAL SEAL.] S. J. RICHEY,
Notary Public.

And filed a bond, executed in the presence of this court, in the penalty of $1,000.00, with sufficient security, conditioned according to the act of Congress aforesaid, and upon the affidavits aforesaid and it appearing to the court that the said Walter S. Gurnee, Jr., and Augustus C. Gurnee are citizens of the State of New York and were at the commencement of the original proceedings in this cause, and that the amount involved in this controversy exceeds the sum of five hundred dollars ($500.00), it is ordered that this cause be removed to the circuit court of the United States for the western district of Virginia for trial at the session of said court next to be held pursuant to the provisions of the act of Congress aforesaid.

8 The bond referred to in the foregoing order is in the words and figures following, to wit:

Know all men by these presents that we, Walter S. Gurnee, Jr., and Augustus C. Gurnee, principals, and Walter S. Gurnee, Hugh W. Sheffey, James Bumgardner, Jr., and P. H. Trout, securities, are held and firmly bound unto the Commonwealth of Virginia in the sum of one thousand dollars; to the payment whereof, will and truly to be made, we bind ourselves and each of us, our and each of our heirs and personal representatives, jointly and severally, firmly by these presents, and we and each of us hereby waive our homestead exemptions as to this obligation and the payment of the money therein mentioned, as witness our hands and seals this 29th day of April, 1884, the same being hereto put by S. A. Anderson, our attorney-in-fact, duly authorized.

The condition of the above obligation is such that whereas an appeal is now pending in the county court of Patrick county, in the State of Virginia, in which said Walter S. Gurnee, Jun'r, and Augustus C. Gurnee are appellants and The Board of Supervisors of said county are appellees, the purpose of which appeal is to recover certain sums of interest due on certain bonds executed by the county aforesaid to the Norfolk and Great Western Railroad 9 Company and held and owned by appellants, the payment of which interest was refused by the board of supervisors of said county; a statement of the amount due for interest on said bonds and claimed in said appeal and a particular discription of each of said bonds will appear fully by reference to the same, as contained among the papers of the appeal aforesaid, and to which reference may be made for a fuller ascertainment thereof; whereas, also, the said Gurnees have filed their petition in the county court of Patrick county aforesaid for the removal of said cause into the circuit court of the United States for the western district of Virginia for the trial thereof, under act of Congress of the United States of America, approved March 3rd, 1875, entitled an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes, and along with said petition files this bond, pursuant to the requirements of said act:

Now, if the said Walter S. Gurnee, Jr., and Augustus C. Gurnee shall, on the first day of the session of the circuit court of the United States of America for the western district of Virginia to be 10 held next after the execution and filing of this bond, enter in said circuit court of the United States a copy of the record in said cause as it is in the records of the said county court of Patrick county, and shall pay all costs that may be awarded by said circuit court of the United States if such court shall hold that such suit was wrongfully removed thereto, then the above obligation to be void; else to remain in full force and virtue.

WALTER S. GURNEE, JR., [SEAL.]
AUGUSTUS C. GURNEE, [SEAL.]
WALTER S. GURNEE, [SEAL.]
HUGH W. SHEFFEY, [SEAL.]
JAMES BUMGARDNER, JR., [SEAL.]
P. H. TROUT, [SEAL.]

All of whom executed, delivered, and acknowledged the above-written bond, by Samuel A. Anderson, their attorney-in-fact.

The powers of attorney refer-ed to in the foregoing bond are in the words and figures following, to wit:

Know all men by these presents that I, Walter S. Gurnee, Jun'r, of the city of New York, in the State of New York, have named, constituted, and appointed S. G. Whittle and Samuel A. An-
11 derson, of the county of Henry, in the State of Virginia, and each of them separately and apart from the other, *our* true & lawful attorneys, either one of whom may act in the premises in the absence of the other as if alone appointed, for me and in my name, place, and stead, to sign, seal, deliver, and acknowledge in due form of law such bond or bonds and in such penalty or penalties as may be requisite, under the act or acts of Congress for the removal of civil suits or proceedings from the State court into the circuit court of the United States, for the removal, at the proper time and in the manner prescribed by the acts of Congress or the act of Congress applicable to the case, of a certain proceeding or suit instituted or proposed to be instituted and prosecuted in the county court of Patrick county, in the State of Virginia, or in the circuit court of said county, as the case may be, against the county of Patrick or the board of supervisors of said county by the said Walter S. Gurnee, Jr., and Augustus C. Gurnee (now abroad and in the city of Mexico), for the recovery of a large sum of money, to wit, the sum of twenty-one thousand seven hundred and fifty-one dollars and five cents, claimed by them to be due and in arrear for interest on seventeen
12 bonds of said county of Patrick, in the State of Virginia, each for the sum of one thousand dollars, of which county bonds the said Walter S. Gurnee and Augustus C. Gurnee are holders; and, furthermore, to prepare and submit with said bond or bonds so to be executed such petition or petitions to said county or circuit court of Patrick county, as the case may be, as may be proper and requisite under said act or acts of Congress applicable to the removal of said proceeding or suit from said State court to the circuit court of the United States for the western district of Virginia, the said Walter S. Gurnee, Jr., and Augustus C. Gurnee being residents and citizens of the State of New York; and to said attorneys or attorney acting in the premises I give and grant full power and authority to waive, in connection with said bond or bonds so to be executed, all claim of

homestead exemption, and to do and perform in my name, place, and stead and that of the plaintiffs in the said proceeding or suit all other acts and things needful in the premises or required by law for the removal of said proceeding or suit from the State court as aforesaid to the circuit court of the United States for the western district of Virginia, hereby ratifying and confirming whatsoever my said attorneys or attorney, acting separately as aforesaid, 13 shall or may lawfully do in the premises by virtue of these presents.

Sealed with my seal this 17th day of March, 1884.

W. S. GURNEE, JR. [SEAL.]

STATE OF NEW YORK,
County and City of New York, } *ss:*

I, John Christopher O'Conner, Jun'r, a notary public in and for the county and city of New York, in the State of New York, do certify that Walter S. Gurnee, Jr., whose name is signed to the foregoing writing bearing date on the 17th day of March, 1884, personally appeared before me, in my county and city aforesaid, and acknowledged said writing to be his act.

Given under my hand and notarial seal this 27th day of March, 1884.

J. C. O'CONNER, JUNI'R,
[Notarial seal here.] *Notary Public, N. Y. County.*

Know all men by these presents that I, Augustus C. Gurnee, of the city and county of New York, in the State of New York, have named, constituted, and appointed, and by these presents do name, constitute, and appoint, S. G. Whittle and Samuel A. Anderson, of the county of Henry, in the State of Virginia, my true and lawful attorneys, each of them separately and apart from the other 14 my true and lawful attorney, either of whom may act in the hereinafter-stated premises in the absence of the other, for me and in my name, place, and stead, to execute, deliver, & acknowledge as one of the principals therein any bonds or bond which may be required or given by Walter S. Gurnee, Jun'r, as principal, or by said Walter S. Gurnee, Jr., and Augustus C. Gurnee, as principals, for the removal from the county court of Patrick county or from the circuit court of said county, as the case may be, into the circuit court of the United States for the western district of Virginia of a certain proceeding or suit instit-ed by the said Gurnees against the county of Patrick, in the State of Virginia, such bond or bonds, to be given in pursuance of the act or acts of Congress for the removal of civil suits from the State courts to the circuit courts of the United States, to be in such penalty or penalties as may be requisite or prescribed in the premises, and to bind me as fully as if executed, delivered, and acknowledged by me in proper person—

Hereby ratifying and confirming whatever my said attorney or attorneys, as the case may be, shall or may lawfully do in the premises by virtue of these presents.

Sealed with my seal this fifteenth day of April, 1884.

A. C. GURNEE. [SEAL.]

15 STATE OF NEW YORK,
County and City of New York, } *To wit:*

I, John Christopher O'Conner, Jun'r, a notary public in and for the county and city of New York, in the State of New York, do certify that Augustus C. Gurnee, whose name is signed to the foregoing writing, bearing date on the 15th day of April, 1884, had acknowledged the same before me in my county and city aforesaid; and, being by me duly sworn, said Augustus C. Gurnee saith that after the payment of all his debts and those for which he is liable and which he will probably have to pay — exceeds the sum of thirty thousand dollars.

Witness my hand and notarial seal this fifteenth day of April, 1884.

[Notarial seal here.] J. C. O'CONNER,
Notary Public, N. Y. Co.

Know all men by these presents that I, Walter S. Gurnee, of the city and county of New York, in the State of New York, have named, constituted, and appointed, and by these presents do name, constitute, and appoint, S. G. Whittle and Samuel A. Anderson, of the county of Henry and State of Virginia, my true and
16 lawful attorneys, and each of them separately and apart from the other my true and lawful attorney (*eith* of whom may act in the hereinafter-stated premises in the absence of the other), for me and in my name, place, and stead, to execute, deliver, and acknowledge, as surety therein, any bonds or bond which may be required or given by Walter S. Gurnee, Jr., as principal, or by said Walter S. Gurnee, Jr., and Augustus C. Gurnee, as principals, for the removal from the county court of Patrick county or from the circuit court of said county, as the case may be, into the circuit court of the United States for the western district of Virginia of a certain proceeding or suit instituted by the said Gurnees against the county of Patrick, in the State of Virginia, such bond or bonds, to be given in pursuance of the act or acts of Congress for the removal of civil suits from the State courts to the circuit courts of the United States, to be in such penalty or penalties as may be requisite or prescribed in the premises, and to bind me as fully as if executed, delivered, and acknowledged by me in proper person, hereby ratifying and confirming whatsoever my said attorney or attorneys, as the case may be, shall or may lawfully do in the premises by virtue of *of* these presents.

Sealed with my seal this tenth day of April, 1884.

W. S. GURNEE. [SEAL.]

17 STATE OF NEW YORK,
County and City of New York, } *To wit:*

I, J. C. O'Conner, Jun'r, a notary public in and for the county and city of New York, in the State of New York, do certify that Walter S. Gurnee, whose name is signed to the foregoing writing bearing date on the tenth day of April, 1884, hath acknowledged the same before me, in my county and city aforesaid; and, being by me duly sworn, said Walter S. Gurnee saith that after the payment of all his debts and those for which he is liable and which he will probably have to pay his estate lying and being in the State of Virginia, within the western district of Virginia, and apart from that elsewhere, is worth over thirty thousand dollars, besides other large assets and effects of said Gurnee within said jurisdiction.

Witness my hand and notarial seal this tenth day of April, 1884.

[Notarial seal here.] J. C. O'CONNOR, JUN'R,
Notary Public, N. Y. Co.

Know all men by these presents that we, Hugh W. Sheffy, James Bumgardner Jun'r, and P. H. Trout, of the city of Staunton, in the
State of Virginia, have named, constituted, and appointed,
18 and by these presents do name, constitute, and appoint, S. G.
Whittle and Samuel A. Anderson, of the county of Henry, in
the same State, our true and lawful attorneys, and each of them separately and apart from the other our true and lawful attorney (either of whom may act in the hereinafter-stated premises in the absence of the other), for us and in our names, place, and stead, to execute, deliver, and acknowledge as sureties therein any bonds or bond which may be required or given by Walter S. Gurnee, Jr., as principal, or by said Walter S. Gurnee, Jr., and Augustus C. Gurnee, as principals, for removal from the county court of Patrick county or from the circuit court of said county, as the case may be, into the circuit court of the United States for the western district of Virginia of a certain proceeding or suit instituted by the said Gurnees against the county of Patrick, in the said State of Virginia, such bond or bonds, to be given in pursuance of the act or acts of Congress for the removal of civil suits from the State courts to the circuit courts of the United States, to be in such penalty or penalties as may be requisite or prescribed in the premises, and to bind us and each of us as fully as if executed, delivered, and acknowledged by us in proper per-
son; and we authorize and empower said attorneys or
19 attorney to waive as to such bond or bonds our respective
homestead exemptions—

Hereby ratifying and confirming whatever our said attorney or attorneys, as the case may be, shall or may lawfully do in the premises by virtue of these presents.

Sealed with our seals this 8th day of April, 1884.

HUGH W. SHEFFY. [SEAL.]
JAMES BUMGARDNER, JR. [SEAL.]
P. H. TROUT. [SEAL.]

STATE OF VIRGINIA, *Augusta County*, } *To wit:*

I, Lewis M. Bumgardner, a notary public in and for the said State of Virginia and county of Augusta, do certify that Hugh W. Sheffy, James Bumgardner, Jr., and P. H. Trout, whose names are signed to the foregoing writing bearing date on the 8th day of April, 1884, have acknowledged the same before me in my county aforesaid; and, being duly sworn by me, the said parties say that after the payment of their debts and those for which they are bound and which they will probably have to pay they are of opinion that their estates, respectively, exceed in value the sum of one thousand dollars.

Given under my hand this 8th day of April, 1884.

LEWIS M. BUMGARDNER,
Notary Public.

20 The proceedings had before the supervisors of Patrick county and the papers therewith filed, refer-ed — in the foregoing, are in the words and figures, to wit:

At a meeting of the board of supervisors for the county of Patrick, held at the court-house thereof on the 7th day of April, 1884.

The Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jun'r, and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees thereof, presented to the board of supervisors of the county of Patrick, at a regular and legal meeting of said board, at Patrick court-house, on the 7th day of April, 1884, seventeen bonds of $1,000.00 each, executed by the county aforesaid to said railroad company and numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, and 30, and demanded payment of the interest due thereon to the first November, 1883, or a levy for said interest, and filed the following account for said interest, viz:

Patrick county, Virginia, in account with the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and the said Walter
21 S. Gurnee, Jr., and Augustus C. Gurnee, assignees of said company.

To interest on seventeen bonds of Patrick county for one thousand dollars each from October 26th, 1868, to November 1st, 1869	1,034	16
To interest from Nov. 1, '69, to Nov. 1, '83, 14 years	868	69
" " on $17,000 to Nov. 1, '70, 1 "	1,020	00
" " thereon, 13 years	795	60
" " on $17,000 to Nov. 1, '71, 1 year	1,020	00
" " thereon, 12 years	734	40
" " on $17,000 to Nov. 1, '72, 1 year	1,020	00
" " thereon, 11 years, to Nov. 1, '83	673	20
" " on $17,000, one year, to Nov. 1, '73	1,020	00
" " thereon, 10 years	612	00
" " on $17,000, one year, to Nov. 1, '74	1,020	00
" " thereon, 9 years	550	80
" " on $17,000, one year, to Nov. 1, '75	1,020	00
" " thereon, 8 years	489	60
" " on $17,000, one year, to Nov. 1, '76	1,020	00
" " thereon, 7 years	428	40
" " on 17,000, one year, to Nov. 1, '77	1,020	90

To interest thereon, 6 years	367	20
" " on $17,000, one year, to Nov. 1, '78	1,020	00
" " thereon, 5 years	306	00
" " on $17,000, 1 year, to Nov. 1, '79	1,020	00
" " thereon, 4 years	244	80
" " on $17,000, one year, to Nov. 1, '80	1,020	00
" " thereon, 3 years	182	60
To interest on $17,000, one year, to Nov. 1, '81	1,020	00
22 " " thereon, 2 years	122	40
" " on $17,000, one year, to Nov. 1, '82	1,020	00
To interest thereon, one year	61	20
" " on $17,000, one year, to Nov. 1, '83	1,020	00
	$21,751	05

Which account said board of supervisors disallowed and refused to levy for in whole or in part.

To L. G. Rucker, clerk of the board of supervisors of Patrick county, Virginia:

You will please take notice that we shall appeal to the county court of Patrick from the decision of the board of supervisors of Patrick county, Virginia, made at this meeting, at the court-house of said county, on the 7th day of April, 1884, refusing to provide for or levy the interest on seventeen bonds of the denomination of $1,000.00 executed on the 27th day of August, 1869, by William Witt, as presiding justice, on behalf of said county, and attested by J. L. Anglin, the clerk thereof, and payable to the Norfolk and Great Western Railroad Company or its assignees twenty years from the 26th October, 1868, with interest thereon at the rate of six per centum per annum from the 26th October, 1868, the interest
23 accruing after the 27th August, 1869, to be paid semi-annually on the 1st day of May and the 1st day of November in each year. Said bonds, which were purchased by and now belong to Walter S. Gurnee, Jr., and Augustus C. Gurnee, are numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, and 30.

Respectfully yours,

NORFOLK AND GREAT WESTERN
RAILROAD COMPANY,
For the Use and Benefit of Walter S. Gurnee, Jr.,
and Augustus C. Gurnee, and
WALTER S. GURNEE, JR., AND
AUGUSTUS C. GURNEE,
Assignees of said Bonds,
By WHITTLE & ANDERSON,
Their Attorneys.

I acknowledge the legal service of the above notice this 7th day of April, 1884.

L. G. RUCKER,
Clerk of the County Court of Patrick County, and as Such
ex Officio Clerk of the Board of Supervisors of said County.

Know all men by these presents that I, S. G. Whittle, am held and firmly bound unto the county of Patrick in the sum of one hundred and fifty dollars; to the payment whereof, well and truly to be made, I bind myself, my heirs, &c., and I hereby
24 waive the benefit of my homestead exemption as to this debt.

Witness my hand and seal this 7th day of April, 1884.

The condition of the above obligation is such that whereas the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and said Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees of said railroad company, have appealed from a decision of the board of supervisors of Patrick county rejecting an account for interest on seventeen bonds of the said county, for $1,000.00 each, executed by William Witt, agent for said county, and payable to said railroad company or its assigns:

Now, if the said Gurnees or the said railroad company, for their use and benefit, shall faithfully prosecute the said appeal and pay all costs that shall be adjudged against them, then the above obligation to be void; else to remain in full force and virtue.

S. G. WHITTLE. [SEAL.]

Signed, sealed, acknowledged, and delivered before me this 7th day of April, 1884.

L. G. RUCKER, *Clerk.*

25 To John R. Moore, attorney for the Commonwealth of Patrick county:

You will please take notice that the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and said Gurnees, assignees of said company, by counsel, will appeal to the county court of Patrick county from the decision of the board of supervisors of Patrick county, Virginia, made at their meeting, at the court-house of said county, on the 7th day of April, 1884, refusing to provide for or levy the interest on seventeen bonds, of the denomination of $1,000.00, executed on the 27th day of August, 1869, by William Witt, presiding justice, on behalf of said county, and attested by J. L. Anglin, the clerk thereof, and payable to the Norfolk and Great Western Railroad Company or its assigns twenty years from the 26th of October, 1868, with interest thereon, at the rate of six per centum per annum, from the 26th October, 1868, the interest accruing after the 27 August, 1869, to be paid semi-annually on the 1st day of May & the 1st day of November in each year. Said bonds, which were purchased by and now belong to Walter S. Gurnee, Jr., and
26 Augustus C. Gurnee, are numbered, respect*ful*ly 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, & 30.

Respectfully yours, L. G. RUCKER,
Clerk of the County Court of Patrick County, and as Such ex Officio Clerk of the Board of Supervisors of said County.

Executed on John R. Moore by delivering to him a copy of the within.

April 7th, 1884.

S. H. DUNKLY, *Sheriff.*

STATE OF VIRGINIA, *Patrick County,* } *To wit:*

I, L. G. Rucker, clerk of the county court for the county of Patrick, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain appeal lately depending in the said court between Walter S. Gurnee, Jr., and Augustus C. Gurnee, appellants, and The County of Patrick, appellee, with all things touching the same, as fully and wholly as they now exist among the records of my office.

[SEAL.] In testimony whereof I hereunto set my hand and annex the seal of said court this 3rd day of May, 1884.

L. G. RUCKER,
Clerk of the County Court of Patrick County, Virginia.

27 Bill of costs:

Clerk's fees & taxes ------	$42 26
Attorney ---------------	5 00
Sheriff ----------------	50
	$47 76

Teste: L. G. RUCKER, *Clerk.*

And at another day, to wit, in the clerk's office of said court, on the 1st day of July, 1884, came again the plaintiffs, by counsel, and filed their declaration against the defendant, which is in words and figures as follows, to wit:

Circuit Court of the United States *of* the Western District of Virginia, at Harrisonburg, Va., *sct:*

W. S. Gurnee, Jr., and Augustus C. Gurnee, citizens and residents of the State of New York, complain of the county of Patrick, in the State of Virginia, of a plea that the defendant render to the plaintiffs the sum of $15,314.16, with interest, at the rate of six per centum per annum, on $524.16 thereof from the 1st day of May, 1869, till paid; with like interest on $510 thereof from the 28 1st day of November, 1869; with like interest on $510 thereof from the 1st day of May, 1870; with like interest on $510 thereof from the 1st day of November, 1870, and with like interest on twenty-six parcels thereof, of $510 each, respectively, falling due and becoming payable on the 1st day of May and on the 1st day of November, 1871, and on the same days in each and every year thereafter successively down to and including the 1st day of November, 1883, said several sums of money being parcels of and together constituting the said sum of $15,314.16 above demanded, and are due to the plaintiffs from the defendant for semi-annual instalments of

interest on certain bonds of the defendant hereinafter mentioned, and which the defendant owes, with interest on the parcels thereof as aforesaid, to the plaintiffs and from them unjustly detains; and the plaintiffs aver that by an act of the General Assembly of Virginia entitled "An act to incorporate the Norfolk and Great Western Railroad Company," passed on the 6th day of February, 1867, said company was empowered to construct a railroad thro' various counties in the State of Virginia, and, among others, thro' the county of Patrick, in said State, which said county was by law authorized to subscribe for a portion of the capital stock of said company and to raise the money for such subscription by loans and
29 by levying said money on the property and the tax-payers of said county, to take such steps as by law were required for ascertaining the wishes of the voters of said county qualified to vote for members of the General Assembly as to such subscription, and to obtain the sanction of the county court of said county to such subscription; and the plaintiffs further aver that the county court of said county of Patrick, being duly summoned and constituted as the law required, did agree to order and did order a vote of those qualified to vote for members of the General Assembly in said county, to be taken on the 28th day of November, 1867 (that being the day of the election of said members of the General Assembly), on the question of subscribing two hundred thousand dollars to the stock of said company; which vote was in fact regularly taken and the polls thereof regularly returned by the officers appointed and qualified by and as the law required, the law respecting said vote being duly observed in all things, and that the said county court, on return of said polls, being duly summoned and constituted for the purpose, ascertained that three-fifths of said qualified voters had voted for a subscription of $200,000.00, that being the maxi-
30 mum amount proposed to be subscribed, which said sum did not exceed one-third part of the capital stock to be subscribed by others than the State of Virginia; and the plaintiffs further aver that the said county court, being duly summoned and constituted for the purpose, did authorize the subscription of the said sum of $200,000.00, as voted for by the people of said county, to be made towards the stock of said company, and thereupon the said court, in order to pay for the stock so subscribed for in part, authorized and appointed the presiding justice and the clerk of said court to execute to said company the bonds of said county in sums of $1,000 and $2,000 each, to the amount of $198,000, payable in twenty years from the 26th day of October, 1868, with interest thereon, payable semi-annually on the first day of May and November in each year, and directed that the county seal should be affixed to each of said bonds, and appointed an agent to subscribe for the stock aforesaid, each share thereof being rated at one hundred dollars; and the plaintiffs further aver that, in pursuance of the orders and proceedings aforesaid, William Witt, the presiding justice, and J. L. Anglen, the clerk of said court, signing their respective names
31 and affixing the seal of said county thereto, did afterwards, to wit, on the 27th day of August, 1869, execute and deliver

to said company the bonds designated in said order of court, to wit, bonds of said county to the amount of $198,000, whereby said county promised to pay to said company, twenty years after the 26th day of October, 1868, the sum specified in each bond for value received, with interest, at the rate of six per centum per annum, from said 26th day of October, 1868, the then future interest to *to* be paid semi-annually on the 1st day of May and November in each year. In testimony whereof said county, thro' its said agents, caused the seal of said county to be affixed to each of said bonds; and the plaintiffs further aver that there was annexed to each of said bonds and as a part thereof a blank power of attorney in the words and figures following, viz:

"For value received, —— ——, the undersigned, do hereby irrevocably constitute and appoint —— —— attorney to sell, transfer, and assign *into* — dollars of the registered bonds of the county of ——, with full power of substitution.

Witness — hand and seal this — day of ——, 18—.

—— ——. [SEAL.]

Witness:

—— ——."

32 Seventeen of which said bonds, each for $1,000.00, being the same the interest on which is hereinbefore demanded, were numbered on their faces, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, 31, and said county delivered all of said bonds, including those numbered as last aforesaid, to the said company, and received in consideration thereof, and of $2,000 paid in money, certificates or other sufficient evidences of title to 2,000 shares of the stock of said company rated per share as aforesaid, whereof 170 shares were received by said county in consideration of said seventeen bonds numbered as aforesaid, amounting together to the sum of $17,000; and the plaintiffs further aver that the bonds aforesaid were executed by said county with intent and purpose on its part and were received by said company with like intent and purpose on its part that the same were to be sold, used, and transferred as paper negotiable at the law merchant as necessary means of raising money wherewith to build and equip said railroad; that such forms of power — attorney, if signed and sealed by the president of said company, tho' blank in other respects, and if delivered to a *bona fide* holder along with said bonds and attached thereto as aforesaid, would be and are sufficient, according to the law merchant and the customs and usages of brokers, bankers, and others dealing in
33 such instruments, as well as by the agreement and understanding of said county and company as aforesaid, to transfer a complete title to such *bona fide* holder of said bonds, and that any such holder would have the right to fill the blanks in such power of attorney intended for the transfer of said bonds; and the plaintiffs further, in fact, say that said company, being under necessity of raising money on the bonds aforesaid, did, thro' its agents, on the — day of ——, 18—, cause the said bonds of said county of Patrick, described and numbered as aforesaid, to each one of which

was appended a power of attorney, as before mentioned, which was duly signed and sealed by Thomas S. Flournoy, acting for said company and as its president, to be sold, transferred, and assigned to the plaintiffs as *bona fide* purchasers thereof for value, and then and there said bonds were delivered to said plaintiffs, with said power of attorney attached to each, which was signed and sealed by the president of said company as aforesaid, whereby plaintiffs became and are the rightful *bona fide* holders thereof and entitled to receive and recover the interest due on said bonds, with interest thereon as aforesaid; and, so being *bona fide* owners of said bonds, plain-
34 tiffs presented the same to the board of supervisors of said
county of Patrick, at a regular meeting thereof appointed by law on the 7th day of April, 1884, and demanded that the same be audited and provisions made for the payment of the interest thereon then and there due and in arrear, to wit, the said sum of $15,314.16, with interest calculated on the installments of interest in arrear, brought down to November 1st, 1883, according to law, said claim being made out and in all respects presented and payment thereof demanded according to law, but said board refused to allow or pay or make any provisions for the payment of the same, as the law required, and said county of Patrick, tho' often requested, hath refused and still doth refuse to pay to the plaintiffs the said sum of money above demanded, with interest as aforesaid, or any part thereof; and for this, also, that the defendant render to the plaintiffs another & further sum of $15,314.16, with interest, at the rate of six per centum per annum, on $524.16 thereof from the 1st day of May, 1869, till paid; with like interest on $510 thereof from the 1st day of November, 1869; with like interest on $510 thereof from the 1st day of May, 1870;
35 with like interest on $510 thereof from the 1st day of No-
vember, 1870, and with like interest on twenty-six parcels thereof, of $510 each, respectively, falling due and becoming payable on the 1st day of May and on the 1st day of November, 1871, and on the same days in each and every year thereafter successively down to and including the 1st day of November, 1883, said several sums of money being parcels of and together constituting the said sum of $15,314.16 above demanded, and are due to the plaintiffs from the defendant for semi-annual installments of interest on certain bonds of the defendant hereinafter mentioned and which the defendant owes, with interest on the parcels thereof as aforesaid, to the plaintiffs and from them unjustly detains, for that by an act of the General Assembly entitled "An act to incorporate the Norfolk and Great Western Railroad Company," passed on the 6th day of February, 1867, said company was empowered to construct a railroad thro' the county of Patrick and various other counties situated in the State of Virginia, and to aid in affecting said object the county court of said county, at its regular term commencing on the 23rd day of September, 1867, acting in full compliance with the law relating to the subject, did authorize a vote of those qualified to vote for members of the General Assembly in said county
36 to be taken by the officers appointed and duly qualified by

law at the general election for members of the General Assembly, to be held on the 28th day of November then next ensuing, on the question whether the said court, on behalf of said county, should subscribe the sum of $200,000.00 to the stock of said company, that being the maximum amount so proposed to be subscribed, and which sum did not exceed one-third part of the capital stock to be subscribed by others than the State of Virginia; and the plaintiffs further aver that at the said election the vote aforesaid was regularly and legally taken, and the polls then taken were duly certified and returned by officers appointed by law for that purpose to the clerk of the county court of said county; that by the said poll book it appeared that three-fifths of the persons qualified to vote for members of the General Assembly voting on said question were in favor of said subscription; and the plaintiffs further aver that at a court held for said county on the 26th day of October, 1868, which court was summoned and constituted in every respect as required by law for the purpose of carrying out the wishes of the persons qualified to vote for members of the General Assembly in respect to said subscription, said court did
37 determine to subscribe said sum of $200,000.00 for and on
behalf of said county to the capital stock of said company and entered the amount to be subscribed on their record, appointed an agent to make such subscription, and at another term thereof, to wit, on the 26 day of August, 1869, said court, being duly constituted and organized as the law directs, authorized its then presiding justice and its then acting clerk to execute and deliver to said company, in payment of the said stock at the par value of $100 per share, bonds of said county to the amount of 198,000, payable in twenty years from the 26th day of October, 1868, to bear interest at six per cent. per annum, payable, as to future interest, semi-annually on the 1st day of May and November in each year, to which bonds the seal of said county was directed to be affixed; that the said presiding justice, viz., William Witt, and said then acting clerk of said court, viz., J. L. Anglen, did afterward, to wit, on the 27th day of August, 1869, execute the bonds aforesaid, signing their names thereto as directed by said order of court, and also affixed the seal of said county thereto; that seventeen of the bonds aforesaid, being the same the interest on which is hereinbefore demanded, were
38 numbered on their faces, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9,
10, 11, 12, 23, 24, 25, 29, 31, and said county delivered said bonds to said company, numbered as aforesaid, in payment of 170 shares of its stock and received certificates or other evidences from said company of the transfer to the said county of said shares of stock; and the plaintiffs further aver that the bonds aforesaid were executed by said county with the intent and purpose on its part and were received by said company with like intent and purpose that the same were to be sold and transferred as paper negotiable at the law merchant as a necessary means of constructing and equipping said railroad; that at the time of the delivery of said bonds to said company there was appended by said county to each of said bonds a blank power of attorney in the words and figures following, viz:

For value received —— ——, the undersigned, do hereby irrevocably constitute and appoint —— —— attorney to sell, transfer, and assign unto — — dollars of the registered bonds of the county of ——, with full power of substitution.

Witness — hand and seal this — day of ——, 18—.

—— ——. [SEAL.]

Witness:

—— ——.

To which said blank power of attorney the said railroad company afterwards, to wit, on the — day of ——, 18—, did authorize its
39 president, Thomas S. Flournoy, to attach his name and seal in
order to negotiate said bonds for said company, and the plaintiffs aver that this was in fact done; and the plaintiffs further aver that, said bonds being in the condition aforesaid, said railroad company, thro' its duly authorized agents, caused the same to be sold to the plaintiffs for value *bona fide*, and thereupon —— ——, the attorney appointed in and by each of the said powers, on the — day of —— did assign the said bonds of the county of Patrick to the plaintiffs by endorsing the same with his own hand and delivering said bonds, so endorsed, to the plaintiffs, and plaintiffs, being then the *bona fide* holders and owners of said bonds, presented the same to the board of supervisors of said county of Patrick, at a regular meeting thereof, on the 7th day of April, 1884, and demanded that the same be audited and provision made according to law for the payment of said plaintiffs' claim for interest due to them from said county and in arrear as aforesaid; but said board of supervisors rejected said claim and refused to make any provision for the payment of the
40 same, and said county of Patrick, altho' often requested so
to do, hath refused and still doth refuse to pay to the plaintiffs the said sum of money above demanded, with interest as aforesaid, or any part thereof.

And for that also the defendant afterwards, to wit, on, &c., at, &c., was indebted to the plaintiffs in the further sum of $—— for money before that time and then due and payable from the said defendant to the plaintiffs for interest upon and for the forbearance of divers other large sums of money before then due and owing from the said defendant to the plaintiffs, forborne to the said county of Patrick, at its special instance and request, for divers long spaces of time before then elapsed, and to be paid by the said defendant when the said county of Patrick should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid an action hath accrued to the plaintiffs to demand and have of and from the said county of Patrick the said last-mentioned sum of money, parcel of the said sum above demanded; and in the further sum of $— for interest upon and for the forbearance by
41 the plaintiffs to the defendant, at its request, of moneys due
and owing from the defendant to the plaintiffs, and by the plaintiffs forborne to the defendant, at its request, for a long time before then elapsed.

And for this, also, that the defendant render to the plaintiffs the further sum of $15,314.16, with interest, at the rate of six per centum per annum, on $524.16 thereof from the 1st day of May, 1869, till paid; with like interest on $510.00 thereof from the 1st day of November, 1869; with like interest on $510.00 thereof from the 1st day of May, 1870; with like interest on $510.00 thereof from the 1st day of November, 1870, and with like interest on twenty-six parcels thereof, of $510 each, respectively, falling due and becoming payable on the 1st day of May and on the 1st day of November, 1871, and on the same days in each and every year thereafter successively down to and including the 1st day of November, 1883, said several sums of money being parcels of and together constituting the said sum of $15,314.16 above demanded and are due to the plaintiffs from the defendant for semi-annual installments of interest on certain bonds of the defendant hereinafter mentioned
42 and which the defendant owes, with interest on the parcels
thereof as aforesaid, to the plaintiffs and from them unjustly detains.

And the plaintiffs aver that by an act of the General Assembly of Virginia entitled An "act to incorporate the Norfolk & Great Western Railroad Company," passed on the 6th day of February, 1867, said company was empowered to construct a railroad through various counties in the State of Virginia, and, among others, through the county of Patrick, in said State, which said county was by law authorized to subscribe for a portion of the capital stock of said company and to raise the money for such subscription by loans and by levying said money on the property and the tax-payers of said county, to take such steps as by law were required for ascertaining the wishes of the voters of said county qualified to vote for members of the General Assembly as to such subscription, and to obtain the sanction of the county court of said county to such subscription; and the plaintiffs further aver that the county court of said county of Patrick, being duly summoned and constituted as the law required, did agree to order and did order a vote of those qualified to vote for members of the General Assembly in said county,
43 to be taken on the 28th day of November, 1867 (that being
the day of the election of said members of the General Assembly), on the question of subscribing two hundred thousand dollars to the stock of said company, which vote was in fact regularly taken and the *the* polls thereof regularly returned by the officers appointed and qualified by and as the law required, the law respecting said vote being duly observed in all things, and that the said county court, on the return of said polls, being duly summoned and constituted for the purpose, ascertained that three-fifths of said qualified voters had voted for a subscription of $200,000 00, that being the maximum amount proposed to be subscribed, which said sum did not exceed one-third part of the capital stock to be subscribed by others than the State of Virginia; and the plaintiffs further aver that the said county court, being duly summoned and constituted for the purpose, did authorize the subscription of the said sum of $200,000.00, as voted for by the people of said county, to be made

towards the stock of said company; and thereupon the said court, in order to pay for the stock as subscribed for in part, authorized
and appointed the presiding justice and the clerk of said
44 court to execute to said company the bonds of said county, in
sums of $1,000 and $2,000 each, to the amount of $198,000.00,
payable in twenty years from the 26th day of October, 1868, with interest thereon payable semi-annually on the first day of May and November in each year, and directed that the county seal should be affixed to ea*a*ch of said bonds, and appointed an agent to subscribe for the stock aforesaid, each share thereof being rated at one hundred dollars; and the plaintiffs further aver that in pursuance of the orders and proceedings aforesaid said William Witt, the presiding justice, and J. L. Anglen, the clerk of said court, signing their respective names and affixing the seal of said county thereto, did afterwards, to wit, on the 27th day of August, 1869, execute and deliver to said company the bonds designated in said order of court, to wit, bonds of said county to the amount of $198,000.00, whereby said county promised to pay to said company or its assigns, twenty years after the 26th day of October, 1868, the sum *of* specified in each bond for value received, with interest at the rate of six per centum per annum from said 26th day of October,
1868; the then future interest to be paid semi-annually
45 on the 1st day of May and November in each year. In
testimony whereof said county, through its said agents, caused the seal of said county to be affixed to each of said bonds; and the plaintiffs further aver that there was annexed to each of said bonds and as a part thereof a blank power of attorney in the words and figures following, viz:

For value received, —— —— the undersigned, do hereby irrevocably constitute and appoint —— —— attorney to sell, transfer, and assign unto —— ——, —— dollars of the registered bonds of the county of ——, with full power of substitution.

Witness — hand and seal this — day of ——, 18—.

—— ——. [SEAL.]

Witness:

—— ——.

Seventeen of which said bonds, each for the sum of $1,000.00, being the same the interest on which is hereinbefore demanded, were numbered on their faces, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, 31, and said county delivered all of said bonds, including those numbered as last aforesaid, to the said company and received in consideration thereof and of $2,000.00 paid in
money certificates or other sufficient evidences of title to
46 2,000 shares of the stock o*f* said company, rated per share as
aforesaid, whereof 170 shares were received by said county in consideration of said seventeen bonds, numbered as aforesaid, amounting together to the sum of $17,000; and the plaintiffs further aver that the bonds aforesaid were executed by said county with intent and purpose on its part and were received by said company with like intent and purpose on its part that the same were to be

sold, used, and transferred as paper negotiable at the law merchant
as a necessary means of raising money wherewith to build and equip
said railroad; that such forms of power of attorney, if signed and
sealed by the president of said company, though blank in other respects,
and if delivered to a *bona fide* holder along with said bonds
and attached thereto as aforesaid, would be and are sufficient, according
to the law merchant and the customs and usages of brokers,
bankers, and others dealing in such instruments, as well as by the
agreement and understanding of said county and company as aforesaid
to transfer a complete title to such *bona fide* holder of said
47 bonds, and that any such holder would have the right to fill the
blanks in such power of attorney intended for the transfer
of said bonds; and the plaintiffs further aver that the said company,
on the 18th day of April, 1870, in order to provide for the
construction of its road, entered into a contract and agreement with
Willis Gaylord and John I. Flannagan, partners under the name and
style of Gaylord & Flannagan, and as part of said contract and
agreement did undertake and assume to pay a note of said company
for the sum of thirty thousand dollars, payable at four months,
and as security for said loan the said company did then and there
deposit with said Gaylord & Flannagan bonds of said county of
Patrick to the amount of $30,000, whereof the seventeen bonds of
said county, numbered and described as aforesaid, constituted a
part, and also forty thousand dollars of like bonds of the county of
Southampton & $30,000.00 of like bonds of the county of Brunswick,
to each of which bonds was attached the blank power of attorney,
signed and sealed as aforesaid by the said Thomas S.
48 Flournoy, for and on behalf of said company and acting as
president thereof, whereby said bonds & each of them was
and were assigned in blank so as to pass by delivery; and the plaintiffs
further aver that afterward, to wit, on — day of ——, 187–, at,
&c., said Gaylord & Flannagan paid off and discharged said note
of said company for thirty thousand dollars as aforesaid, with all
interest and costs that had accrued thereon, said company having
failed and neglected to meet and pay the same; and the plaintiffs
further aver that the said Gaylord & Flannagan afterwards, to wit,
on, &c., at, &c., caused said county bonds held as collateral security
as aforesaid for said loan of $30,000 to be negotiated, disposed of,
& sold for value in the city of New York, and the plaintiffs, in fact,
say that thereupon said seventeen bonds, numbered as aforesaid,
and the interest on which, with interest on the instalments thereof,
is demanded as aforesaid, were put upon the market in said city of
New York as bearer bonds, and with the blank powers of attorney attached
thereto as aforesaid, duly signed and sealed by the said
49 Thomas S. Flournoy, president of said company, passed by delivery
as assigned negotiable bonds of said defendant, and as
such and in the plight and condition described as aforesaid the plaintiffs,
by purchase, became the *bona fide* holders thereof for value, and as
such *bona fide* holders by purchase as aforesaid the plaintiffs became and
still are entitled to have and demand of said defendant the interest
due and in arrear on said bonds, to wit, the said sum of $15,314.16,

with interest on said instalment of interest as aforesaid, and, being so entitled and no part thereof having been paid, the plaintiffs, on the 7th day of April, 1884, presented the same to the board of supervisors of said county of Patrick at a regular & lawful meeting thereof, and demanded that the same should be audited & provision made for the payment of said interest instalments, with interest calculated thereon down to November 1st, 1883; but said board rejected said claims and refused to allow or make provision for the payment of same or any part thereof, and the plaintiffs in fact say that the
said defendant, although often thereto requested, hath neglected
50 & refused and still doth neglect & refuse to pay to the plain-
tiffs the above sum of money above demanded, with interest as aforesaid, or any part thereof.

And also that the said defendant render to the plaintiffs the further and other sum of $15,314.16, with interest on the parcels thereof, as in the first count stated, for this, that on the 27th day of August, 1869, said defendant, in pursuance of the act of Assembly in such case made and provided & of the wishes of a lawful three-fifths majority of those in the said county of Patrick qualified to vote for members of the General Assembly, duly taken and recorded at an election in said county lawfully conducted and held for the purpose, and of the action and orders of the county court of said county, did execute under its county seal & issue and deliver to the Norfolk and Great Western Railroad Company, among others, seventeen bonds, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, 31, whereby the said county promised to pay to the Norfolk and Great Western Railroad Company or its assigns, twenty years after the said 26th day of October, 1868, the sum of $1,000 specified in each of said
bonds or obligations for value received, with interest at the rate
51 of six per cent. per annum from the 26th day of October, 1868,
which interest the said county bound itself in and by said bonds or obligations to pay semi-annually on the 1st day of May and November in each year, which said bonds were in due form and, in pursuance of the orders of said county court, executed by William Witt, presiding justice, and J. L. Anglen, the clerk of said court, with the seal of said county to each of said bonds affixed.

And the plaintiffs further aver that at the time of such execution, issue, and delivery of said bonds there was appended to each of them and as a part thereof a blank power of attorney, whereby it was in effect provided that the said Norfolk & Great Western Railroad Company might and should, for value received, irrevocably appoint & constitute an attorney in blank to sell, transfer, & assign unto —— —— dollars of the registered bonds of the county, with full power of substitution.

And the plaintiffs further aver that afterwards, to wit, on the — day of ——, 18—, the said company, by its president, Thomas S. Flournoy, acting by its authority, did sign and seal said power of
attorney in blank, and, for value received, did transfer and
52 irrevocably deliver said seventeen bonds to —— ——, as the
holders and assignees thereof, whereby and according to the true intent and understanding of said defendant and of said com-

pany said bonds became and were negotiable and entitled, according to the law merchant, to pass by delivery.

And the plaintiffs further aver that afterwards, to wit, on the — day of ——, 18–, and in due course of business, they, the said plaintiffs, purchased said bonds on the market and became and still are the *bona fide* holders thereof; by reason whereof the plaintiffs aver that right and action accrued to them as such *bona fide* holders and negotiable assignees of said bonds to have and demand of said defendant the interest instalments due and in arrear on said bonds, no part of which had or has been paid by said defendant, and, being so entitled, the said plaintiffs, on the 7th day of April, 1884, as holders and assignees of said negotiable bonds as aforesaid, made claim and demanded of the board of supervisors of said county for the amount due and in arrear to them on account of the interest instal-
53 ments aforesaid, with interest thereon as aforesaid, which said claim and demand said board of supervisors rejected and refused to make any provision for the payment thereof.

And thereupon said plaintiffs instituted their suit for the amount of said claim so rejected and refused in the county court of Patrick county in the manner prescribed by law, which said suit has been removed to this hon. court in pursuance of the act of Congress in such case provided; and the plaintiffs further aver that the said defendant, although often requested, hath neglected and refused and still doth neglect and refuse to pay to the plaintiffs or either of them the sum of money above demanded, with interest as aforesaid, or any part thereof.

And the plaintiffs further aver that the said defendant, The County of Patrick, altho' right & action have accrued to the plaintiffs to have and demand of the defendant said several sums of money in the respective counts herein specified, with interest as aforesaid, & altho' often requested so to do, hath hitherto wholly neglected & refused & still doth neglect & refuse to pay to
54 the plaintiffs or either of them said several sums of money or any part thereof, to the damage of the plaintiffs fifty thousand dollars; & therefore they sue, &c., &c.

SHEFFEY & BUMGARDNER,
Of Counsel for Pl'ffs.

And at another —, to wit, in said clerk's office, on the 7th day of July, 1884, came again the plaintiffs, by counsel, and filed the return of the service of said declaration (see declaration already copied) on the defendant; which return is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
6th Internal Revenue District, Va.

This day B. F. Terry personally appeared before me, W. E. Craig, collector 6th dist., Va., and made oath that on the 5th day of July, 1884, in the county of Patrick, at the court-house thereof, he delivered a true copy of the foregoing or within declaration to John R. Moore, the attorney for the Commonwealth of said county, and, at the same time & place, a true copy of the same declaration to L. G. Rucker, the clerk of the board of supervisors of said county, said Patrick court-house being the place of business of said Moore and of said Rucker and where they each reside.

[SEAL.] Given under my hand and official seal this 7th day of July, 1884.

W. E. CRAIG,
Collector 6th Dist., Va.

55 And at another day, to wit, at a t-rm of said court continued and held at Harrisonburg on the 16th day of October, 1884, came again the plaintiffs, by counsel, and the following order was entered:

W. S. GURNEE, Jr., & A. C. GURNEE
vs.
PATRICK COUNTY.

On the motion of the plaintiffs it is ordered that they have leave to amend their declaration, provided a copy of such amendment be delivered to the defendant or its counsel within ninety days from the rising of this court; and it is further ordered that the defendant do, within one hundred and twenty days from such rising, file in the clerk's office of the court such pleas to the plaintiffs' declaration as it may be advised to file thereto, and cause copies thereof to be delivered to plaintiffs' counsel within ten days after such filing, so that issues upon such pleas may be made up, and that, if practicable, the case may be ready for trial at the next term; and its is further ordered that the case be continued until the next term of this court.

56 And at another day, to wit, in chambers at Harrisonburg, in said district, Hon. John Paul, judge of the district court, sitting alone, the following order was entered:

In the Circuit Court of the United States for the Western District of Virginia, at Harrisonburg.

W. S. GURNEE & Others
vs.
PATRICK COUNTY.

It is ordered that the clerk of this court send all the papers in the above-named case to the clerk of this court, at Danville, that the same may be docketed in said court and be there finally heard and determined.

JOHN PAUL,
Dist. Judge.

June 29th, 1885.

And at another day, July 10th, 1885, at a term of said court, at Danville, in said district, Hon. John Paul, judge of the district court, sitting alone, the following order was entered:

57 In the Circuit Court of the United States for the Western District of Va., at Danville.

GURNEE
vs.
PATRICK COUNTY.

It is ordered that this case be transferred to this court, at Harrisonburg, and that all the papers therein be sent to the clerk of said court.

And now, at this day, May 3rd, 1887, came again the plaintiffs, by counsel, and the defendant, likewise by counsel, and the following order was entered:

W. S. GURNEE, &c.,
vs. In Assumpsit.
PATRICK COUNTY.

It appearing to the court that the record does not show the filing of the demurrer of the defendant to the plaintiffs' declaration and each count thereof, it is ordered that said demurrer to the plaintiffs' declaration and each count thereof be entered *nunc pro tunc.*

58 And on the same day, to wit, May 3rd, 1887, the following vacation order, dated May the 2nd, 1887, was entered of record, which is in the words and figures here following, to wit:

In the Circuit Court of the United States for the Western District of Virginia, at Harrisonburg. In Vacation.

W. S. GURNEE, &c.,
vs.
PATRICK COUNTY.

This day came the parties, by their attorneys, and in pursuance of an agreement by counsel submitted in vacation to the judges of this court for their decision, the demurrer filed by the defendant to the plaintiffs' declaration and to each count thereof and the said defendant's demurrer to the plaintiffs' declaration and each count thereof being argued, and because it seems to the court that the plaintiffs' declaration and each and every count thereof *are* insufficient in law, it is considered by the court that the demurrer 59 aforesaid be sustained, and, the record showing that this court has not jurisdiction of this case, it is ordered that the same be remanded to the county court of Patrick county, Virginia.

May 2d, 1887.

HUGH L. BOND, *C'r. Judge.*
JOHN PAUL, *Dist. Judge.*

And at another day, to wit, at a term of said court continued and held at Harrisonburg on the 4th day of May, 1887, came again the plaintiffs, by counsel, and the following order was entered:

GURNEES
vs.
PATRICK COUNTY.

It being suggested to the court that it is the purpose of the plaintiffs to ask for a writ of error to the final order entered on yesterday remanding this case to the county court of Patrick county on the ground that this court has no jurisdiction thereof, on the motion of the plaintiffs the order herein entered on yesterday, the 3rd of May, 1887, *be* suspended for ninety days from the rising of this court.

60 And at another day, to wit, on the 30th day of June, A. D. 1887, the plaintiffs filed, as a part of the record in this case, a writing signed by the Hon. Hugh L. Bond, judge of the U. S. circuit court for the western district of Virginia, which is in the words and figures here following, to wit:

In the Circuit Court of the United States, Western District of Virginia.

W. S. GURNEE & AUGUSTUS C. GURNEE, Citizens of the State of New York,
vs.
THE COUNTY OF PATRICK, in the State of Virginia.

The plaintiffs in this action feel themselves aggrieved by the judgment of the court entered therein, and pray a writ of error therefrom to the Supreme Court of the United States.

W. S. GURNEE, JR., &
A. C. GURNEE,
By HUGH W. SHEFFEY,
Their Counsel.

The writ of error is allowed.

HUGH L. BOND, *C't Judge.*

61 And on the same day, to wit, on the 30th day of June, A. D. 1887, the plaintiffs caused to be issued and filed of record in this case a writ of error, which is in the words and figures here following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between W. S. Gurnee, Jr., and A. C. Gurnee, plaintiffs, and The County of Patrick, defendant, a manifest error hath happened, to the great damage of the said W. S. Gurnee, Jr., and A. C. Gurnee, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of
62 the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

[SEAL.] Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

A. K. FLETCHER,
Clerk of the Circuit Court of the United States for the Western District of Virginia, at Harrisonburg, Va.

Allowed by—
HON. HUGH L. BOND,
Judge of the Circuit Court of the U. S. for Western District of Va.

The following bond is filed of record in this case, which is in the words and figures here following, to wit:

63 Know all men by these presents that we, Hugh W. Sheffey and Walter S. Gurnee, are held and firmly bound unto the county of Patrick, in the State of Virginia, in the full and just sum of five hundred dollars, to be paid to the said county of Patrick, its successor, certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, o-r heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a circuit court of the United States for western district of Virginia, held at Harrisonburg, in a suit depending in said court between Walter S. Gurnee, Jr., and Augustus C. Gurnee, plaintiffs, against the said County of Patrick, defendant, a judgment was rendered against the said Walter S. Gurnee, Jr., and Augustus C. Gurnee, and the said Walter S. Gurnee, Jr., and Augustus C. Gurnee having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said county of Patrick, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

64 Now, the condition of the above obligation is such that if the said Walter S. Gurnee, Jr., and Augustus C. Gurnee shall prosecute their writ of error to effect and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGH W. SHEFFEY. [SEAL.]
W. S. GURNEE. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—

—— ——.
—— ——.
—— ——.

STATE OF NEW YORK, } *ss:*
County & City of New York, }

I, A. J. H. Timpson, a notary public in and for the county and city of New York, in the State aforesaid, do certify that Walter S. Gurnee, whose name is signed to the within writing bearing date on the 30th day of June, 1887, hath acknowledged the same before me, in my county and city aforesaid, and being duly sworn by me says that after the payment of his debts and those for which he is bound and is likely to be called upon to pay his estate is worth much more than the penalty of the within bond; that his property within the western district of Virginia is fairly worth fifty thousand dollars, and that the same is unencumbered.

Given under my hand the day and date above and my official seal — N. P.

[SEAL.] A. J. H. TIMPSON,
Notary Public, N. Y. Co.

65 Approved by—
HUGH L. BOND, *C'r. Judge.*

And on the same day, to wit, on the 30th day of June, A. D. 1887, the plaintiff caused to be issued and filed of record in this case a citation, which is in the words and figures here following, to wit:

The United States of America to the county of Patrick, in the State of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Virginia, at Harrisonburg, wherein W. S. Gurnee, Jr., & A. C. Gurnee are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error
66 mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] A. K. FLETCHER,
Clerk U. S. Circuit Court for the Western District of Virginia, at Harrisonburg, Va.

I, A. K. Fletcher, clerk of the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Harrisonburg, in said district, do hereby certify that the foregoing is a true transcript and copy of the record of the papers in the law cause of W. S. Gurnee, Jr., and Augustus C. Gurnee *vs.* The County of Patrick, as the same are now of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said cou-t, at Harrisonburg, in said district, this 5th day of July, A. D. 1887.

[Seal United States Circuit Court, Western District of Virginia.]

A. K. FLETCHER, *Clerk.*

67 (Copy.)

$1,000. County of Patrick. No. 13.

Stamp.

The county of Patrick, in the State of Virginia, hereby promises to pay to the Norfolk and Great Western Railroad Company or its assigns, twenty years from thetwenty-sixth day of October, 1868, the sum of one thousand dollars for value received, with interest thereon at the rate of six per centum per annum from the twenty-sixth day of October, 1868, the future interest payable semi-annually on the first day of May and the first day of November in each year.

State of Virginia.

In testimony whereof the said county has caused its corporate seal to be hereto affixed, with the proper signature of the presiding justice, attested by the clerk, in accordance with the order of the county court of said county, this twenty-seventh day of August, 1869.

Patrick County, Va., Seal.

WM. WITT,
Presiding Justice.

J. L. ANGLIN, *Clerk.*

For value received the undersigned do- hereby irrevocably constitute and appoint —— —— attorney to sell, assign, and transfer unto —— —— — dollars of the registered bonds of the county of ——, with full power of substitution.

Witness — hand and seal this — day of ——, 18—.

THOS. S. FLOURNOY, [SEAL.]
Pres't N. & G. W. R. R. Co.

Witnesses:
EDWIN DE LEON.
J. D. IMBODEN.

[Endorsed:] County of Patrick. Bond. (Copy.)

68 I, A. K. Fletcher, clerk of the circuit court of the United States for the western district of Virginia, at Harrisonburg, in said district, do hereby certify that the foregoing is a true copy of a copy of a bond filed in the cause of W. S. Gurnee, &c., *vs.* Patrick County, in said court.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Harrisonburg, in said district, this 7th day of December, A. D. 1889.

Seal United States Circuit Court, Western District of Virginia.

A. K. FLETCHER, *Clerk.*

With the understanding that the original bond be produced in court for inspection, and that the copy be printed in the record as near alike the original as reasonably practicable, it is hereby stipulated and agreed that this paper shall be filed and considered as a part of the record in the case of W. S. Gurnee *et al. vs.* The County of Patrick, No. 347, October term, 1889, in the Supreme Court of the United States.

A. T. BRITTON,
HENRY WISE GARNETT,
Of Counsel for Pl'ff in Error.
JNO. W. DANIEL,
Of Counsel for Patrick Co.

[Endorsed:] Supreme Court U. S. October term, 1889. No. 347. W. S. Gurnee *et al.*, pl'ffs in error, *vs.* The County of Patrick. Stipulation and add'n to record.

[Stamped:] Office Supreme Court U. S. Filed Mar. 5, 1890. James H. McKenney, clerk.

Endorsed on cover: W. Virginia C. C. U. S. No. 347. W. S. Gurnee, Junior, and A. C. Gurnee, plaintiffs in error, *vs.* The County of Patrick. Filed July 9, 1887.

SUPREME COURT OF THE UNITED STATES.

October Term, 1889.

W. S. Gurnee, Junior, and A. C. Gurnee, Plaintiffs in Error,
vs.
The County of Patrick.
No. 347.

We agree that the following may be printed as a part of the record in this case.

A. T. BRITTON,
HENRY WISE GARNETT.
A. B. BROWNE,
For Pl'ffs in Error.
J. W. DANIEL,
Att'y for Def't in Error.

Oyer Craved.

The defendant demands oyer and copy of all the bonds or writings obligatory and the conditions thereof, mentioned in the declaration of the plaintiff and in each of the several counts thereof.

Demurrer

And the said defendant comes and defends the wrong or injury and says that the declaration of the plaintiff and each count thereof and the matters therein contained in manner and form as the same are set forth are not sufficient in law for the said plaintiff to prove or maintain his aforesaid action against the defendant, and that the said defendant is not bound by law to answer the same; and this he is ready to verify. Wherefore, by reason of the insufficiency of the said declaration and of each count thereof, the defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action against the defendant.

[Endorsed :] Supreme Court U. S. 1889, October term. No. 347. W. S. Gurnee, Jr., *et al.*, pl'ffs in error, *v.* County of Patrick. Stipulation and addition to record.

[Stamped :] Office Supreme Court U. S. Filed Apr. 21, 1890. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED
OCT 23 1890
[illegible]
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 57.

W. S. GURNEE, Jr., and A. C. GURNEE,
PLAINTIFFS IN ERROR,
vs.

THE COUNTY OF PATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF VIRGINIA.

BRIEF FOR PLAINTIFFS IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
HENRY WISE GARNETT,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

October Term, 1890.

No. 57.

W. S. Gurnee, Jr., and
A. C. Gurnee,
Plaintiffs in Error,
vs.
The County of Patrick.

In Error to the Circuit Court of the United States for the Western District of Virginia.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

Plaintiffs in error are citizens of the State of New York. They are the owners and holders of certain outstanding bonds of the county of Patrick, and on the 7th day of April, 1884, presented to the Board of Supervisors of that county written demand for the payment of the interest thereon to the first day of November, 1883, or a levy for said interest, amounting, according to the account then presented, to twenty-one thousand seven hundred and fifty-one dollars and five cents. Such account was disallowed by said Board and the levy demanded refused.

Thereupon, and on the same date, the plaintiffs in error filed an appeal from this action to the County Court of said County. On the 6th day of May following, upon proper petition and bond, the case was removed by the plaintiffs in error into the Circuit Court of the United States for the Western District of Virginia.

July 1, 1884, plaintiffs in error filed their declaration in said Circuit Court against said county. (Rec., 12–22.) Thereto the defendant demurred (Rec., 24), and on May 3, 1887, (Rec., 24,) judgment was rendered by the Circuit Court sustaining such demurrer and directing that—

> "The record showing that this Court has not jurisdiction "of this case, it is ordered that the same be remanded to "the County Court of Patrick County, Virginia."

To review this judgment the present writ of error is brought.

The case, therefore, stands upon declaration and demurrer. Such demurrer admits all facts well pleaded.

In substance the declaration recites:

First. By act of the General Assembly of Virginia, entitled an Act to incorporate the Norfolk and Great Western Railroad Company, passed on the 6th day of February, 1867, said company was empowered to construct a railroad through various counties in the State of Virginia, and among others, through the said county of Patrick. Copy of said act is printed as appendix hereto.

Second. The county of Patrick was by the law of Virginia authorized to subscribe for a portion of the capital stock of said company, and to raise the money for such subscription by loans and by levying said money on the property and taxpayers of said county, provided the duly qualified voters of said county should, on proper election duly called, vote such subscription. Copy of said law—act of January 8, 1867—is printed as an appendix hereto.

Third. That said election was duly called and held on the 28th day of November, 1867, on the question of subscribing two hundred thousand dollars to the stock of said company; that said vote was regularly taken, the polls thereof regularly returned to the proper officers, "the law "respecting said vote being duly observed in all things."

Fourth. That the County Court of said county being duly summoned and constituted for the purpose, ascertained that three-fifths of the qualified voters had voted for the subscription of two hundred thousand dollars. That thereupon said Court authorized such subscription to be made, and in order to pay therefor, authorized and appointed the presiding justice and clerk thereof to execute to said company the bonds of said county in sums of one thousand dollars and two thousand dollars each, to the amount of one hundred and ninety-eight thousand dollars, payable in twenty years from the 26th day of October, 1868, with interest thereon, payable semi-annually on the first day of May and November in each year; directed that the county seal be affixed to each of said bonds, and appointed an agent to subscribe for the stock aforesaid.

Fifth. That thereupon the presiding justice and clerk of said Court did, on the 27th day of August, 1869, execute and deliver to said company the bonds so authorized to the amount aforesaid, seventeen of which bonds, by designated number, now owned by the plaintiffs in error, were delivered in exchange for an equivalent amount of stock of said Company, dollar for dollar.

Sixth. That there was annexed to each of said bonds and made a part thereof a blank power of attorney in the words and figures following, to wit:

"For value received, ———— the undersigned, do
"hereby irrevocably constitute and appoint ———— at-
"torney to sell, transfer and assign unto ————, ————
"dollars of the registered bonds of the county of ————,
"with full power of substitution.

"Witness —— hand and seal this —— day of ——, 18—.
"———— (SEAL.)

"Witness:————."

To which said blank power of attorney said railroad company afterwards authorized its president, Thomas S. Flournoy, to attach his name and seal in order to negotiate said bonds for said company, which was in fact done.

Seventh. That in order to provide for the construction of its road said company on the 18th day of April, 1870, entered into a contract and agreement with Willis Gaylord and John I. Flannigan whereby the latter assumed payment of the note of said company for the sum of thirty thousand dollars, and as security therefor said company deposited with said Gaylord and Flannigan the bonds of said Patrick county, to the amount of thirty thousand dollars, whereof the seventeen bonds involved in this suit were a part, together with like bonds of other counties, to all of which was attached the blank power of attorney signed and sealed by said Thomas S. Flournoy for and on behalf of said company and acting as president thereof, whereby said bonds and each of them were assigned in blank so as to pass by delivery.

Eighth. That said Gaylord and Flannigan paid and discharged said note, the company having failed to meet the same, and thereupon caused these bonds so deposited as security therefor, to be put upon the market in New York for sale as bearer bonds, and that these plaintiffs became the *bona fide* purchasers and holders thereof for value.

Ninth. That demand for the interest due and in arrears on said bonds amounting to the sum of fifteen thousand three hundred and fourteen dollars and sixteen cents with interest on each instalment of interest from the day the same became due, was made by plaintiffs in error upon the Board of Supervisors of Patrick county at the regular meeting of that body. Said Board rejected such demand and refused to allow or make provision for the payment of same or any part thereof.

ASSIGNMENT OF ERRORS.

The Court below erred:

First. In denying the jurisdiction of the said Circuit Court and remanding the case to the State Court—the cause having been properly removed into the Circuit Court by the authority of existing Acts of Congress.

Second. In sustaining the demurrer filed against the said declaration in favor of said defendants, because the facts well pleaded disclosed a just cause of action on which the plaintiffs in error were entitled to the judgment prayed.

ARGUMENT.

JURISDICTION.

It will be observed that the judgment below is against the plaintiffs, upon the merits of the action, and yet concludes with finding that the Court is without jurisdiction. Waiving discussion upon the form of the judgment, we, however, submit that the Circuit Court *did* have jurisdiction and that the case *was* properly removed thereto.

I.

Jurisdiction under Section 639 Revised Statutes.

The diverse citizenship of the parties is plainly established. The declaration recites that the plaintiffs in error are "citizens and residents of the State of New York." The defendant is a municipal corporation in the State of Virginia.

Section 639 of the Revised Statutes provides, *inter alia:*

> *Third.* "When a suit is between a citizen of the State in "which it is brought and a citizen of another State it may "be so removed on the petition of the latter, whether he be "plaintiff or defendant, filed at any time before the trial or "final hearing of the suit, if before or at the time of filing

"said petition he makes and files in said State Court an "affidavit stating that he has reason to believe, and does "believe, that from prejudice or local influence he will not "be able to obtain justice in such State Court."

The section cited further provides the manner and form of proceeding in order to make and perfect such removal. This section embodies the act approved March 2, 1867 (14 Stat. p. 558). This Court has held that this section was not repealed by the removal act of March 3, 1875.

Hess *vs.* Reynolds, 113 U. S., 73.
Railroad Company *vs.* Bates, 119 U. S., 464.

Whether it has been so repealed by the subsequent act of March 3, 1887, it is not necessary here to inquire. The case was removed into the Circuit Court in May, 1884, and is therefore not affected by any subsequent change in the law.

Now there is attached to the petition for removal in this case, filed in said State Court (Rec., 2–3), the affidavit of each of these plaintiffs in error.

"That he has reason to believe, and does believe, that "from prejudice and local influence the plaintiffs in said "proceeding or suit will not be able to obtain justice in the "County Court of Patrick County aforesaid."

This averment is made in the mode and form prescribed by the statute and the practice formulated thereunder. Furthermore the petition for removal was accompanied by the statutory bond required, and copy of the entire record of the cause (Rec., 3–12), and upon such petition oath, bond and record the Circuit Court on May 6, 1884, made the proper order.

"That this action be docketed in this Court for further "proceedings therein as required by the act of Congress in "such case provided, and that the record thereof be filed "with the Clerk of this Court, which is done accordingly; " * * *" (Record, p. 1.)

The argument below upon the point of jurisdiction (as disclosed by briefs of counsel) seems to have proceeded solely upon the question whether the bonds in suit were within the exception to section 1 of the act of March 3, 1875, which provides that:

> "Nor shall any Circuit or District Court have cognizance "of any suit founded on contract in favor of an assignee "unless a suit might have been prosecuted in such Court to "recover thereon if no assignment had been made, *except in "case of promissory notes, negotiable by the law merchant, and "bills of exchange.*"

Whilst we shall expect to show that the bonds in suit are negotiable paper within the full meaning of this provision, as expounded by this Court, we here insist that upon the face of the record this cause was properly removed under section 639 of the Revised Statutes. For, as was said by this Court in Hess *vs.* Reynolds, *supra:*

> "We are of opinion that this clause of section 639 re-"mains and is complete in itself, *furnishing its own peculiar "cause of removal*, and prescribing, for reasons appropriate "to it, the time within which it must be done."

It cannot be contended that the right of removal given by section 639 does not extend to a case not within the exception of the act of 1875, above quoted. The original Judiciary Act contained in section 11 substantially the same provision, denying the right to sue in the Federal Courts upon any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had been made. Yet section 12 of the same Judiciary Act provided for the removal of certain classes of cases commenced in State Courts, into the Federal Courts.

In Bushnell *vs.* Kennedy (9 Wall., 387,) the question was directly raised whether an action not falling within the exception of section 11 could be removed, under the authority of section 12, from the State to the Federal Court. This Court, without dissent, held that it could be so removed.

The Court in the case cited draws the sharp distinction between the *original* jurisdiction exercised by the Federal Courts, and holds the limitations of section 11 to apply thereto, but as having no effect upon the power of *removal* authorized by section 12. In this connection the Court observes:

> "That section (12), as we have already stated, provides
> "for the removal of suits of defendants. The restriction in
> "the 11th section is not found in the 12th. Nor does the
> "reason for the restriction exist. In the 11th section its
> "office was to prevent frauds upon the jurisdiction and vex-
> "ation of defendants, by assignments made for the purpose
> "of having suits brought in the name of assignees, but in
> "reality for the benefit of assignors. In the 12th it would
> "have no office, for the removal of suits could not operate
> "as a fraud on jurisdiction, and was a privilege of defend-
> "ants, not a hardship upon them."

The same rule is reaffirmed in City of Lexington *vs.* Butler, 14 Wall., p. 282, wherein it was held (page 293):

> "Suits may properly be removed from a State Court
> "into the Circuit Court in cases where the jurisdiction of
> "the Circuit Court, if the suit had been originally com-
> "menced there, could not have been sustained, as the
> "twelfth section of the Judiciary Act does not contain any
> "such restriction as that contained in the eleventh section
> "of the act defining the original jurisdiction of the Circuit
> "Courts. Since the decision in the case of Bushnell *vs.*
> "Kennedy, 9 Wallace, 387, all doubt upon the subject is
> "removed, as it is there expressly determined that the re-
> "striction incorporated in the eleventh section of the Judi-
> "ciary Act, has no application to cases removed into the
> "Circuit Court from a State Court, and it is quite clear
> "that the same rule must be applied in the construction of
> "the subsequent acts of Congress extending that privilege
> "to other suitors not embraced in the twelfth section of the
> "Judiciary Act, (1 Stat. at Large, 79.) Such a privilege
> "was extended by the twelfth section of the Judiciary

"Act only to an alien defendant, and to a defendant, "citizen of another State, when sued by a citizen of the "State in which the suit is brought, but the privilege "was much enlarged by subsequent acts, and the act in "question extends it to a plaintiff as well as to a defendant, "where the controversy is between a citizen of the State "where the suit is brought and a citizen of another State, "if the matter in dispute exceeds the sum of five hundred "dollars, exclusive of costs, which shows that the jurisdiction of the Circuit Court in this case was beyond controversy."

In the still later case of Claflin *vs.* Commonwealth Ins. Company, 110 U. S., 81, this question was maturely considered and upon re-argument the same conclusion was reached. The question involved is stated by the Court (page 88) thus:

"The question is whether, under the second section of the "act of March 3, 1875, 18 Stats., 470, a suit of a civil "nature, brought in a State Court, where the matter in dispute exceeds the sum or value of $500, and in which there "is a controversy between citizens of different States, or between citizens of a State and foreign States, citizens or subjects may be removed into the Circuit Court, which suit, "because it is founded on a contract in favor of an assignee, "could not have been brought in the Circuit Court if no assignment had been made, not being the case of a promissory note, negotiable by the law merchant, or of a bill of "exchange."

In pursuing a comparison between the act of 1789 and 1875, the Court in this case (p. 90) further observes:

"The exception out of the original jurisdiction, as to assignees of non-negotiable contracts, occupies in both statutes the same relative position, qualifying the provisions of "the section in which it is contained, as to suits commenced "in the Circuit Court, *and not being found in, nor necessarily* "*connected with, that regulating the removal of suits from the* "*State Courts.*"

After review of the authorities cited, *supra*, the opinion concludes (p. 92):

"We are bound to take the words of the law in their "usual, ordinary, literal meaning, and to construe the two "provisions in the different sections in the same sense which, "in previous statutes, had uniformly been given to them, and "not invent a new application and relation of the two clauses "without any indication whatever of any intention on the "part of Congress to that effect."

So also in Delaware County *vs.* Diebold Safe Co. (133 U. S., 473), from the Circuit Court of the United States for the District of Indiana, this Court said (p. 486):

"It was contended that that Court had not cognizance of "the suit, because the plaintiff's assignors could not have "prosecuted it, inasmuch as one of them was a citizen of "the same State as the defendant. But that restriction was "applicable only to suits commenced in the Federal Courts, "and did not extend to suits removed into it from a State "Court. Act of March 3, 1875, c. 137, secs. 1, 2, 18 Stat., 470; "Claflin *vs.* Commonwealth Ins. Co., 110 U. S., 81."

In the light of these authorities it is therefore confidently submitted that this cause was properly removed under section 639 of the Revised Statutes. In other words, upon the question of jurisdiction, it is immaterial whether the bonds in suit are or are not negotiable by the law merchant, inasmuch as the removal was petitioned for and allowed upon the distinct ground that from prejudice and local influence a fair trial could not be had in the State Court.

II.

Jurisdiction upon Negotiable Instruments.

The sole ground upon which the defendant denies the jurisdiction of the Circuit Court is that the bonds in question are not negotiable by the law merchant, and hence fall within the prohibition of section 1 of the act of 1875, because the original payee is a Virginia corporation, and could not therefore maintain suit against the County of Patrick in the Federal Courts.

The bonds of the series and numbers described in the declaration to recover the interest whereon this suit is brought are identical in form. Number 13 of that series will be found in the record (p. 29), and for convenience is reproduced here. It is as follows:

"$1,000. (*Copy.*) No. 13.

"COUNTY OF PATRICK.

"The county of Patrick, in the State of Virginia,
"hereby promises to pay to the Norfork and Great
"Western Railroad Company or its assigns, twenty
"years from the twenty-sixth day of October, 1868,
"the sum of one thousand dollars for value received,
"with interest thereon at the rate of six per centum
"per annum from the twenty-sixth day of October,
"1868, the future interest payable semi-annually on
"the first day of May and the first day of November
"in each year.

STAMP.

STATE OF VIRGINIA.

"In testimony whereof the said county has caused its
" corporate seal to be hereunto affixed,
" with the proper signature of the pre-
" siding justice attested by the clerk, in
" accordance with the order of the
" county court of said county, this
" twenty-seventh day of August, 1869.

PATRICK COUNTY,
VA., SEAL.

"J. L. ANGLIN, WM. WITT,
" *Clerk.* *Presiding Justice.*

"For value received the undersigned do hereby irrevo-
"cably constitute and appoint attorney to sell, assign
"and transfer unto dollars of the registered bonds of
"the county of , with full power of substitution.
"Witness hand and seal this day of 18 .
"THOS. S. FLOURNOY, [SEAL.]
"*Pres't N. & G. W. R. R. Co.*

"Witnesses:
"EDWIN DE LEON.
"J. D. IMBODEN."

As preliminary to discussion of the terms of this paper and citation of the authority on which we shall submit that same is a negotiable instrument by the law merchant, we ask the attention of the Court to the legislation of Virginia under which these bonds came into existence, viz.:

The acts of the General Assembly of that State passed on January 8, 1867, authorizing county, city or towns to subscribe to the stock of companies incorporated for the construction of railroads; and of February 6, 1867, incorporating the Norfolk and Great Western Railroad Company, both of which acts are printed as an appendix to this brief.

By the later act books of subscription were authorized to be opened in the City of Norfolk, the towns of Portsmouth and Danville, in thirteen separate counties, specifically named, "and in such other places, and under the direction of such "other agent or agents as a majority of the commissioners "appointed for the City of Norfolk shall designate, for the "purpose of receiving subscriptions to an amount not ex-"ceeding ten millions of dollars, in shares of one hundred "dollars each, to constitute a joint capital stock for the "purpose of constructing a railroad from the City of Nor-"folk, *via* Danville, to some point on the Virginia and "Tennessee Railroad, not east of Glade Springs, and for "providing everything necessary for convenient transporta-"tion on the same."

By the former act it was provided that "When a joint "stock company shall have been incorporated to construct "a railroad or turnpike through, by or near to any county, "city or town likely to be benefitted thereby, the Court of "such county, city or town" might issue an order for a vote to be taken by the qualified voters of such municipality to determine whether subscription should be made to the stock of such company. The manner and form of procedure is clearly prescribed therein and contingent on affirmative vote for such subscription, such municipality was authorized to subscribe for such stock within prescribed limitations, and to borrow money on the credit and obligation of such municipality, to provide for the payment thereof, and to cause proper levies of taxes to be imposed for the repayment of such loan and interest thereon.

By comparison of the declaration in this case with the provisions of this act it will be seen that the plaintiffs in error aver with great particularity of detail the full and complete compliance of the authorities of Patrick County therewith; with the provisions of law whereby the election was ordered; was duly had; the returns properly canvassed and found to be in favor of such subscription; the subscription duly made; the bonds issued in payment therefor, and the receipt of the entire amount of stock subscribed by said county in exchange for said bonds, dollar for dollar, up to the amount of one hundred and ninety-eight thousand dollars of bonds for a corresponding amount of stock.

Taken together, therefore, these two acts demonstrate that the County of Patrick was highly interested in the construction of this road. By the terms of the act incorporating the company the construction of the road was to be accomplished by actual cash subscriptions to its stock. By the terms of the other act Patrick County was clearly authorized to aid that enterprise by borrowing money and making that subscription. When, therefore, that county determined by its vote to engage in this enterprise—subscribe for and receive the full amount of the stock, and paid to said company therefor, dollar for dollar, its written obligations to the amount of such subscription—it must plainly have been the intention of all parties to the transaction that the bonds in question were to be issued by the county and taken by said company as negotiable instruments which it could place in the markets of the country and raise thereon the necessary funds to complete and equip the road. Whatever view may be taken as to the *form* of this county obligation, the conclusion is irresistible that the county did not intend to offer, nor the company intend to accept, in lieu of cash payment, any instruments or obligation which would not pass in the commercial world as negotiable by the law merchant, and as creating a security recognized both in form and substance by intending investors as negotiable securities on which the funds necessary for the construction of the railroad might safely be advanced. The *rationale* of the whole business leads only to this conclusion: no man, whether lawyer or layman, could doubt the understanding or intention of the original parties to the transaction.

As shown by the declaration herein, the bonds involved in this suit were offered in open market in the city of New York, and were purchased by the plaintiffs in error in good faith and for value. It needs no argument to show that the bonds, with the authority to transfer in blank plainly imprinted thereon, passed a good title to the holder, and were issued by the county, circulated by the company and bought by the public as negotiable obligations passing by mere delivery.

Hence it is submitted that this Court should not view with favor technical objections sought to be made by the county to prevent the just determination of its obligations herein by the Federal Courts, in a suit brought by the *bona fide* holders of such bonds as citizens of another State.

Passing to consideration of the bonds themselves, we submit they are, both in form and substance, promissory notes, fully negotiable by the law merchant and recognized as such, both by established commercial usage and the repeated decisions of this Court. The bond itself is a simple promise to pay without condition, using the term "*for value* "*received*," the common form of expression in all promissory notes. It is certain in amount, in time of payment, in rate of interest, and the time for semi-annual payment of such interest. We submit that this Court has never been called to pass upon an obligation of this character more closely resembling in form and substance a common promissory note than the bonds of this county involved in this suit, for in form and recital it meets the full definition of a promissory note as given in Story on Promissory Notes, sec. 1, thus:

> "A promissory note may be defined to be a written en-
> " gagement by one person to pay another person therein
> " named, absolutely and unconditionally, a certain sum of
> " money at a time specified therein."

If the obligation ran to the Norfolk and Great Western Railroad Company without words of transfer, some question might be raised upon the negotiable character of the instrument; but the promise is to the said company "*or its assigns.*" These words have been held by the repeated decisions of this tribunal, as well as other Courts of high authority, to be synonymous with the term "or order."

In the case of Porter *vs.* The City of Janesville (3 Federal Reporter, 617), from the Circuit Court for the Western District of Wisconsin, Judge Bunn was called upon to decide upon the negotiable character of a bond of that city, which very closely resembles the bonds in question here. Such bond was payable to a railroad company "or its assignees." The Court held:

> "The other point, that the instrument is not in form
> " negotiable, is not tenable. Though the words 'bearer'
> " or 'order' are more commonly used to denote an intention
> " to make a note transferable by delivery or indorsement,
> " they are by no means essential, and any other words,
> " evincing such an intent, are equally efficient for such a
> " purpose. The words 'or its assignees,' used in the instru-
> " ment, undoubtedly render the note capable of being nego-
> " tiable, the same as though the words 'or order' had been
> " used. They show an intent to render them transferable
> " from person to person. The fact of coupons being an-
> " nexed for the payment of semi-annual interest running
> " to bearer, these being part and parcel of the bond itself,
> " confirms this view, and evinces a like intent to place the
> " bonds on the market as commercial paper. Indeed, the
> " purpose of their issue being to aid in the construction of
> " a railroad, and to raise money for that purpose, they
> " would be of very little use to effectuate that object if they
> " could not be transferred. (See City of Lexington *vs.* But-
> " ler, 14 Wall., 282, 293; Brainerd *vs.* N. Y. & H. R. Co.,
> " 25 N. Y., 496; Blake *vs.* Board Sup'rs S. Co., 61 Barb.,

"149; 3 Kent's Com., 77; Story on Notes (7th ed.), para-
"graphs 43 and 44, and cases cited; Daniels on Negotiable
"Instruments, paragraph 1046: Klauber *vs.* Biggerstaff, 47
"Wis., 551.")

In County of Wilson *vs.* National Bank, 103 U. S., p. 770, the obligation sued on was the bond of said county running to a named railroad, "or the holder hereof if this bond is "transferred by the signature of the president." Precisely in effect the language and the form of the bonds here in question.

Commenting thereon this Court said, (p. 776:)

"It is next claimed that the bonds sued on were not
"negotiable paper, and that, therefore, the plaintiff below
"showed no right of action in itself.
"In order to make a promissory note or other obligation
"for the absolute payment of a sum certain, on a certain
"day, negotiable, it is not essential that it should in terms
"be payable to bearer or order. Any other equivalent ex-
"pressions demonstrating the intention to make it nego-
"tiable will be of equal force and validity. Com. Dig.,
"Merchant, F. 5; 3 Kent, Com., Lect. 44, p. 77; Chitty,
"Bills, c. 5, p. 180 (8th ed.); Bayley, Bills, 120 (5th ed.);
"Story, Prom. Notes, sec. 44.
"The purpose of the plaintiff in error that the bonds on
"which the suit is brought should be negotiable is perfectly
"clear. They are payable to the railroad company or
"holder if the bond is transferred by the signature of the
"president of the company.
"This is equivalent to making the bonds payable to the
"company or order, provided the 'order' or indorsement is
"made by the president of the company. They bear his
"indorsement transferring them to bearer. On what
"ground their negotiability can be denied it is difficult to
"imagine. They are in precisely the same plight as a
"promissory note payable to order and indorsed in blank
"or to bearer, the title to which passes by mere delivery.
"Chitty, Bills, 252, 253, (8th ed.); Bayley, Bills, c. 1, sec.
"10, p. 31 (5th ed.)."

In Ackley School District *vs.* Hall, 113 U. S., 135, the bond of the School District therein involved was payable to

"Foster Brothers or order" and by them indorsed in blank. This Court said (pp. 139, 140):

"These instruments, although described in the Iowa stat-
"ute as bonds, have every characteristic of negotiable prom-
"issory notes. They are promises in writing to pay, at all
"events, a fixed sum of money, at a designated time therein
"limited, to named persons or their order. Upon being in-
"dorsed in blank by the original payee, the title passes by
"mere delivery, precisely as it would had they been made
"payable to a named person or bearer. After such indorse-
"ment, the obligation to pay is to the holder. The decisions
"of this Court are numerous to the effect that municipal
"bonds, in the customary form, payable to bearer, are com-
"mercial securities, possessing the same qualities and inci-
"dents that belong to what are strictly promissory notes
"negotiable by the law merchant. There is no reason why
"such bonds, issued under the authority of law and made
"payable to a named person, or order, should not, after be-
"ing indorsed in blank, be treated by the courts as having
"like qualities and incidents. That they are so regarded by
"the commercial world cannot be doubted. Manufactur-
"ing Co. *vs.* Bradley, 105 U. S., 180."

Story, *supra*, says:

"In order to make a promissory note negotiable it is not
"essential that it should in terms be payable to bearer or
"order. Any equivalent expressions, clearly demonstrating
"the intention to make it negotiable, will be of equal force
"and validity. Thus, for example, a promissory note pay-
"able to A. *or assigns* is negotiable. The French law is
"equally liberal in its exposition of this subject; for, although
"the Code of Commerce requires promissory notes to be
"payable to a party *or his order*, yet it is held a sufficient
"compliance with the terms of this article, if other equiva-
"lent terms are used. Thus, for example, if the note is
"made payable to A. or *at his disposal* (*ou a sa disposition*),
"that will be sufficient to establish its negotiability."

And Kent, vol. 3, page 77, says:

"The instrument must be made payable to the payee or
"to his *order* or *assigns* or to *bearer* in order to render it
"negotiable. It must have negotiable words" (such as

those mentioned) "on its face showing it to be the intention to give it a transferable quality."

Daniel on Negotiable Instruments, sec. 1496, speaking of Coupon Negotiable Bonds, says :

"Coupon bonds are generally made payable to the party "to whom they are issued, *or bearer;* and in such cases are "transferable by delivery. Sometimes they are payable to "order, and then they pass by indorsement. Sometimes "they are payable to the *holder*, which term is regarded as "equivalent to bearer. Sometimes they are payable to a "certain party '*or his assigns;*' and in that case the party's "assignment is necessary to pass title. But if he make an "assignment in blank, the title then passes, by delivery. "In Virginia, where the Act of Assembly made certain "bonds 'payable to the holder,' it was held a sufficient indication that they were designed to be negotiable and "payable to bearer."

Joynes, J., said :

"The act of March 29th, 1857, in terms, makes the "coupons 'transferable by delivery,' but does not in terms "make the bonds themselves transferable by delivery. "This, however, is implied in the provision 'that they shall "'be payable to the holder,' the obvious intent being that "they shall be payable to such persons as may, from time "to time, be the holders. These bonds, therefore, as well "as the coupons, pass from hand to hand, by delivery. "But if the bond contained no negotiable words, it would "not be deemed negotiable."

Case of Royal British Bank vs. Turquand.

The leading case on the subject of the negotiable character or qualities of municipal bonds, is that of the Royal British Bank *vs*. Turquand, 6 Ell. & Bl., 327, decided in Exchequer Chambers, on error from the Court of Queen's Bench ; and which is briefly this: The Directors of a railway company *were legally authorized to borrow money* on Bond, PROVIDED *a general resolution of the company was passed to that effect.* The officers of the railroad company borrowed a sum of money of a banker; and executed to him therefor the company's bond, which soon afterwards passed from him into the hands of a *bona fide* holder, to whom payment was refused; and he sueing, the railroad company pleaded in defence, that, as a matter of fact, there had never been any general resolution of the company authorizing the loan; but the Court held that it was not necessary to pass upon the plea—

"For (said Jervis, Ch. J.,) it seems to us, that the plea, "whether we consider it as a confession and avoidance, or "a special *non est factum*, does not raise any objection to "this advance, as against the company. We may now take "for granted that the dealings with these companies are "not like the dealings with other partnerships, and that "parties dealing with them, are bound to read the statute "and deed of settlement. But they are *not* bound to do "more. And the party here, on reading the deed of settlement saw, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the "authority may be made complete by a resolution, he would "have a right to infer the fact of a resolution, authorizing "that which, on the face of the document, appeared to be "legitimately done."

And judgment accordingly was rendered for the plaintiff.

In Brainerd *vs.* New York & Harlem R. R. Company, 25th N. Y. Rep., page 496, which was the case of a railroad bond payable to "*Geo. L. Schuyler, or his assigns*," the Court in speaking of Governmental, corporate and municipal securities, says:

"The point of objection, when it is sought to bring such "securities within the law of commercial paper, is, that, "being under seal, they are deeds, and commercial instruments are simple contracts. But when such obligations "are issued to secure the payment of money upon time, and "contain on their face an expression showing that they are "expected to pass from one person to another, and thus to "perform the office of bills and notes and money, as the "words '*bearer*' or '*assigns*' or '*holder*,' or the like, the "Courts of this country, with a single exception, and those "of this State without any exception, have concurred in attaching to them the attributes of commercial paper."

And the Court then cited the case of White *vs.* the Vermont & Massachusetts Railroad Co., 21 How., 575, where a railroad company issued a bond simply payable to——— and the same was held to be negotiable paper. The holder had the right to insert his name in the blank.

In Blake *vs.* The Board of Supervisors of Livingston County, 61 Barb., N. Y., p. 149, a *bond*, under seal for $900, issued by the *County of Livingston*, in pursuance of the resolutions of its Board of Supervisors to pay bounties to soldiers enlisted in the service of the United States, was delivered to a soldier, who, as it afterwards turned out, was not only an infant at the time, but was moreover very shortly afterwards discharged, at the instance of his father, from the service of the United States. The said $900 bond of Livingston County was made payable to the said soldier (naming him) "*or to his certain attorneys, executors, administrators, or assigns.*" The said bond passing into the hands of a *bona fide* holder for value, who, being refused payment, instituted suit against the County of Livingston, which defended on the following grounds: That the instrument was in the form of an ordinary bond, and not commercial paper; that the obligee was an infant at the time of its delivery; that he did not serve the United States, and that he, the obligee, had procured the bond upon a false representation that he was eighteen (18) years of age. But the Court, holding the county liable, remarked that:

"The action upon the obligation in question is to be "governed in all respects by the rules applicable to actions "upon commercial paper. The obligation, though *called* a "bond, is payable to *Peter Clark, or to his certain attorneys, "executors, administrators or assigns*, and belongs to that "class of obligations which has been expressly held, in this "State, not to be specialties, but in the nature of commer"cial paper, negotiable by delivery under an assignment in "blank." Citing Brainerd *vs.* New York and Harlem Railroad, *supra*.

And, generally, on the subject of the negotiable words used in the Patrick County bonds, see Daniel on Negotiable Instruments, sec. 1496; 3 Kent's Com. 77; Story on Prom. Notes, secs. 43, 44; Chit. on Bill (8th ed.), chap. 5, p. 180; Bailey Bills (5th ed.), p. 120.

In Cromwell *vs.* County of Sac, 96 U. S., 51-63, the Court, in placing municipal bonds, and those of counties acting corporately, on the footing of negotiable paper, says:

> "They are transferable by delivery, and when issued by "competent authority, they pass into the hands of a *bona* "*fide* purchaser for value, before maturity, freed from any "infirmity in their origin. Whatsoever fraud the officers, "authorized to issue them, may have committed in disposing of them, or however entire may have been the failure "of the consideration promised by the parties receiving "them, these circumstances will *not affect* the title of the "subsequent *bona fide* purchaser for value, before maturity; "or the liability of the municipalities. As with other negotiable paper, mere suspicion that there may be a defect "of title in its holder, or knowledge of circumstances "which would excite suspicion as to his title in the mind "of a prudent man, is not sufficient to impair the title of "the purchaser. That result will only follow where there "has been bad faith on his part. Such is the decision of "this Court, and substantially its language, in the case of "Murray *vs.* Lardner, reported in 2d Wall., 110, where the "leading authorities on the subject are considered."

In Gelpeke *vs.* the City of Dubuque, 1 Wallace, 175-120, the Court, expressing like views as to the commercial character of municipal obligations, proceeds to declare its determination to uphold these views, notwithstanding any State decisions to the contrary, in language as follows:

> "We are not unmindful of the importance of uniformity "in the decisions of this Court and those of the highest local "Courts giving construction to the laws and constitutions "of their own States. It is the settled rule of this Court, in "such cases, to follow the decisions of the State Courts. But

"there have been heretofore, in the judicial history of this
"court, as doubtless there will be hereafter, many excep-
"tional cases. We shall never immolate truth, justice and
"the law, because a State tribunal has erected the altar and
"decreed the sacrifice. The judgment below is *reversed* and
"the cause remanded for further proceedings in conformity
"to this opinion."

It was contended below, and that contention will be repeated here on behalf of the defendant in error, that this bond or obligation being executed by a municipal corporation of Virginia, and made primarily payable to a railroad corporation created by the laws of that State, is, as to its negotiable qualities, controlled solely by the laws of Virginia. It is further contended that the law of Virginia requires a fixed place of payment in order to render a note, or promise to pay, negotiable. In support of that contention the decision of Judge Hughes, in the case of Cronin *vs.* County of Patrick (4 Hughes, 529), will be cited, wherein that conclusion is asserted.

But it is firmly insisted that, neither upon reason nor the weight of established authority, can such contention be sustained. The decisions of this Court completely negative the soundness of such proposition.

As well observed by Mr. Dwight Jones in his work on the construction of commercial and trade contracts (page 59):

"The United States Supreme Court has for many years
"endeavored to build up in this country a uniform system
"of commercial law, commensurate with the increasing
"commercial relations of the different parts of the country.
"It has accordingly held that questions of a general nature,
"arising upon commercial contracts, should be decided pur-
"suant to the principles of the law merchant, or the broad
"doctrines of commercial law, and has refused to follow
"decisions of State Courts upon these questions unless in
"unison with such doctrines or principles."

Thus, whilst it has been held that an instrument otherwise negotiable becomes by attaching a seal, a specialty and non-negotiable, this Court, in the case of Mercer County *vs.* Hackett (1 Wall., 83), ruled as follows (p. 97.):

"Can evidence of fraud practiced by the railroad company, to whom those bonds were delivered, and by whom they were passed to a *bona fide* holder for value, or the fact that they were negotiated at less than their face value, be received to defeat the recovery of the plaintiff below? This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper, and their value depends mainly upon this character. Being issued by States and corporations, they are *necessarily* under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the Courts, or of the common law, cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by Courts, as parts of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability, to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment, by parading some obsolete judicial decision, that a *bond*, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition not only in this Court, but of every State in the Union, is well known and admitted. But we have been referred to the case of Diamond *vs.* Lawrence County, 37 Penna St., 363, for a single decision to the contrary."

Whilst, in the case cited, the Supreme Court of Pennsylvania (from whence it came) had ruled *contra*, the decision of this Court added:

"If this decision of that learned Court was founded on "the construction of the constitution or statute law of the "State, or the peculiar law of Pennsylvania as to *titles to* "*land*," we would have felt bound to follow it. But we have "often decided that on questions of mercantile or commer-"cial law or usages, which are not peculiar to any place, we "do not feel bound to yield our own judgment, especially if "it be fortified by the decisions of all other English and "American Courts."

Hence, while Judge Hughes may have held in the Cronin case, *supra*, as to the bonds of Patrick county, of the character involved in this suit, that they were "in the ordinary form of the *single bill* long used in Virginia," it does not follow that because they assimilate in language or otherwise to such "single bill," they are not, upon the law as expounded by this Court, negotiable by the law merchant. The attempt to assimilate the bonds here in suit with the obligations given to insure the specific performance of acts, or to guarantee even the payment of money by way of surety, must signally fail when brought to the test of the circumstances under which these bonds of Patrick county were issued, and the reasons which actuated their issue.

To repeat briefly the suggestion already made, it should be here again stated that these bonds were issued in payment of an authorized and lawful subscription to the stock of a railroad company, which road, by the very terms of the act incorporating the company, was to be constructed solely by the means of such stock subscription. The *stock* of the company was the property of the company. By the law of its creation it was authorized to exchange this stock for money or its representative and to apply the proceeds thereof to the construction of the road. When Patrick county claimed the right and privilege to subscribe for this stock, and did so, the corresponding duty of paying therefor at once arose. The company could not issue its stock except upon the payment of money or its equivalent, and its road was to be built from the proceeds of the sale of the stock. Assuming at this stage of the argument the statutory power conferred by the laws of Virginia upon Patrick county to make this subscription, the fact that the county paid therefor by its notes or promises to pay, puts the case in precisely the attitude it would occupy if the subscription had been made by a private individual and the company had accepted, in lieu of currency, his written note or promise to pay. Whatever refinement of reasoning may be sought to be indulged to evade the payment of this paper *now*, no man can doubt the intention of the parties at the time of the original undertaking.

The Form of Transfer.

Great stress is sought to be laid upon the language of the annex to the bond containing the blank assignment duly executed by the original payees. From the authority of the Cronin case, *supra*, more especially, the defendant here contends that the word "registered," as used therein, destroys the negotiable character of the instrument.

Thereto it is answered :

First. This annex to the bond in no manner or form qualifies the promise of the instrument which is to pay this company or its assigns a fixed sum of money on a day certain, with interests payable semi-annually, and on named dates. Abundant authority has been cited to show that the words "or assigns" are the full legal equivalent to the words "or order," and under common commercial usage carry all the transferable qualities of commercial paper. In other words, if endorsed in blank, the title then passes by delivery, or if made payable to a named third party, the title likewise passes to such party. The legal cunning which by subtlety of argument would seek to create a fanciful distinction between an endorsement in blank, such as appears upon this paper, as against the ordinary mode of transfer of title in commercial paper, would simply apply a strained, unjust and indefensible construction, which we submit no decision of this Court can be found to sustain. Conceding in the utmost degree that the law applicable to commercial paper may be in the highest sense technical, it is subordinate to that higher law which prevails in the construction of all written instruments, to wit, *the intention of the parties*. Unless in this case this Court can say that Patrick county did not intend to give this railroad company its written obligation of payment in such form that the company might thereon raise the money to construct its road by placing these bonds upon the money markets of the world, we submit with entire confidence that it cannot ignore the *intention of the parties* by applying to the written obligation of this county, technical rules founded upon the statute law of Virginia or otherwise, which will change that plain intention, and upon which intention and understanding the maker of this obligation, and the railroad company as well, consciously acted.

Second. The word "registered" as used in this annex to this bond was plainly so used solely in aid of its negotiability. It merely certified to the intending investor that these bonds had been properly recorded in and by that county and nothing more. There was certainly nothing upon their face which, by the mere use of this word was intended by the parties to the transaction to change their negotiable quality. By the law of many of the States even bearer or coupon bonds are thus required to be registered solely for the purpose of aiding their negotiable quality. Mr. Coler, in his work on Municipal Bonds, sets forth the legislation of particular States, requiring such registration to promote their negotiability. At page 416, he observes:

> "The instrument is put in circulation with all the proofs "upon its face that are necessary to give it every quality of "negotiability. It passes from hand to hand without ques- "tion, all uncertainties being dissipated by the fact that it "has passed the test of the State authorities, and whether "originally valid or not is valid in the hands of the inno- "cent holder for value."

And he adds (p. 417):

" To fully apprehend the great importance of registering, " it is only necessary to note the difference that exists in " the circulation and market value of registered and other " municipal bonds."

This annex to the bond assimilates in language the form which has long been in use in the transfer of the stock of corporations. Yet it is horn book law that the possession of such certificates of stock with blank assignment, executed in the precise form shown by the annex upon the bonds here in suit, pass from hand to hand by mere delivery, freed from all equities which might attach to them in the hands of prior owners. No clearer statement of the law in this regard can be found than that given by this Court in Bank *vs.* Lanier, 11 Wall., 369, where it was held that stock so transferred for value without notice gave the purchasers full right and remedy as against prior holders. In commenting on the force and value of stock certificates, this Court, in the case cited, declared that they had become the basis of " all commercial transactions in all the large cities " in the country, and are sold in open market, the same as " other securities. Although *neither in form nor in character* " *negotiable paper*, they approximate to it as nearly as practicable. If we assume that the certificates in question are " not different from those in general use by corporations, " and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied " upon. No better form could be adopted to assure the " purchaser that he can buy with safety."

Dos Passos on Stock Brokers and Stock Exchange, page 596, deals at length with this subject in precisely the same line and upon the basis of many adjudicated cases.

By the pleading in this case it is shown that the bonds here in suit were pledged by the original payee—the Norfolk and Great Western Railway Company—to secure the guarantors of its paper; that such guarantors were compelled, on default of the company, to take up its paper, and thereafter sold to these plaintiffs in error, in open market in

New York, these bonds given them as such collateral security. So deposited as collateral security, their necessary office was to enable the guarantors to dispose of them as negotiable securities if found requisite to indemnify their guarantee. There can be no question as to their title to the securities given for the purpose stated. In Swift *vs.* Tyson, (16 Pet., 1), this Court, speaking by Mr. Justice Story, said that it entertained no doubt "that a *bóna fide* holder for a "pre-existing debt of a negotiable instrument is not affected by any equities between antecedent parties, when "he has received the same before it became due, without "notice of any such equities."

And the same principle is reaffirmed in Oates *vs.* National Bank (100 U. S., pp. 239-246).

See also Allen *vs.* Dallas, &c., Railroad Company (3 Woods, 316).

And in the hands of innocent purchasers for value before maturity the bonds in suit bind the defendant for their full amount, both of principal and interest. For it was well held by this Court, in Cromwell *vs.* County of Sac (96 U. S., p. 60), as follows:

> "But, independently of the fact of such full payment, we "are of opinion that a purchaser of a negotiable security "before maturity, in cases where he is not personally "chargeable with fraud, is entitled to recover its full "amount against its maker, though he may have paid less "than its par value, whatever may have been its original "infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder "rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at "whatever price, takes the benefit of the entire obligation "of the maker."

III.

Validity of the Bonds.

It may, perhaps, be contended at the bar that the bonds here in question issued without authority of law, and hence are not in any view a charge upon the county of Patrick in the hands of either the original payee or any subsequent holder. The substance of this contention, as suggested to us by opposing counsel, rests primarily upon the proposition that whilst the county was authorized to borrow money upon its faith and credit, to pay for the stock, it could not lawfully *exchange* its bonds issued therefor directly with the railroad company for such stock.

Stated in that form this contention is fully answered by the decision of this Court in Meyer *vs.* The City of Muscatine (1 Wall, p. 384), where objection was made to the bonds there in suit:

> "Because, under the authority to borrow a sum of money, "no money was ever borrowed by the city; but instead these "bonds were delivered to the officers of the Mississippi and "Missouri Railroad Company, and by their agents and "brokers sold to the plaintiffs at a price greatly below their "par value."

But this objection was overruled by the Court in the following language:

> "The city was authorized to issue the bonds in order to "borrow money to pay for the stock. If the company chose "to receive the bonds in payment for the stock, retaining a "lien on the stock until the bonds were paid, there was no "legal obstacle in the way of their doing so. The object of "issuing the bonds was thus accomplished, and no injury "was done to those who were to pay them. It is neither "averred in the answer, nor claimed in the argument, that "the railroad company took them at less than their face. It "does not appear that any one objected then, and no one "can object now. After the bonds passed into the hands of "the railroad company, the company was at liberty to sell "them on such terms as it might deem proper."

Venice v. Murdock. 92 U.S. 501.

But the contention of counsel may be carried to the point of denying the power of the defendant to issue its bonds in any form in order to pay for its stock subscription.

If that contention be here made it must rest upon a series of decisions made by this Court culminating in the case of Hill *vs.* Memphis, decided at the recent term (134 U. S., p. 198). The expressed doctrine of that case and the prior adjudications of this Court on which it rests is directed solely to the denial of the validity of municipal bonds, where the power to issue them is absolutely wanting.

In the case of Hill *vs.* Memphis, *supra*, the bonds of the town of Memphis, which were issued in payment of the stock subscribed by it to the railroad there in question, were found to be invalid by this Court because the authority of the town to subscribe therefor did not contain any authority to borrow money or make a loan or otherwise provide for such payment except by funds arising from taxation. The want of power in that case, and on which this Court held the bonds in suit invalid, was the more marked because in the legislation of the State authorizing such town subscription like subscription was authorized by counties with express authority to such counties to issue bonds in payment for such stock.

But the case cited in no manner controls or affects the case at bar. Here, by the act of Virginia, under which the County of Patrick made this subscription (see Appendix, section 50), it was expressly authorized to negotiate "a "loan or loans for and in the name of such county" for the express purpose of making payment of its subscription to the stock of the railroad company. Hence our case is one wherein *ex necessitate* the authority given to borrow money also carried the right to issue the usual commercial evidence of indebtedness therefor. And it matters not that such evidence of indebtedness was given the railroad company direct in exchange for its stock, and that the company was made in that form an agent to negotiate the same, for the validity of such transaction is expressly affirmed in the [redacted] case of Meyer *vs.* The City of Muscatine, *supra.*

Inspection of the authorities cited in Hill *vs.* Memphis, *supra*, plainly indicate that the bonds here in suit are recognized authoritative obligations, to which the doctrine of that case has no application.

Thus, the first case cited therein, Police Jury *vs.* Britton (15 Wall, 566), involved the question whether the municipality had implied authority to issue negotiable securities payable in future of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money to pay the ordinary expenses of its government or funding a previous debt. In denying such power in the case cited this Court, is careful to observe as follows (p. 572):

> " We do not mean to be understood that it requires, in " all cases, express authorities for such bodies to issue nego-" tiable paper. The power has frequently been implied " from other express powers granted. Thus, it has been " held that the power to borrow money, implies the power " to issue the ordinary securities for its repayment, whether " in the form of notes or bonds payable in the future. So, " the power to subscribe for stock in a railroad or to pur-" chase property for a market house, and other like powers " which cannot be carried into execution without borrowing " money or giving obligations payable in the future, have " been held sufficient to raise the implied power to issue " such obligations."

In the next case cited, Mayor *vs.* Ray, (19 Wall. 468), involving in substance the same question as that presented in Police Jury *vs.* Britton, *supra*, this Court again observes, (pp. 477–478):

> " There are cases, undoubtedly, in which it is proper and " desirable that a limited power of this kind should be con-" ferred, as where some extensive public work is to be per-" formed, the expense of which is beyond the immediate " resources of reasonable taxation, and capable of being

"fairly and justly spread over an extended period of time. "Such cases, however, belong to the exercise of legislative "discretion, and are to be governed and regulated thereby. "Where the power is clearly given, and securities have been "issued in conformity therewith, they will stand on the "same basis and be entitled to the same privileges as public securities and commercial paper generally."

In the next case cited, Claiborne County *vs.* Brooks (111 U. S., p. 400,) in denying the power of the county to issue negotiable bonds in payment for the construction of a Court-house therein, this Court repeats the language above quoted in Police Jury *vs.* Britton, and in terms admits that such power may exist if "clearly implied from some other "power expressly given, which cannot be fairly exercised "without it."

And in Kelley *vs.* Milan (127 U. S., p. 150), this Court holds:

> "That even the power to subscribe for such stock does "not carry with it the power to issue negotiable bonds in "payment of the subscription, unless the power to issue "such bonds is expressly or *by reasonable implication* conferred by statute," citing authorities.

Within the exception which these cases clearly establish we submit the case at bar plainly falls. For it is manifest that not only was the power to borrow plainly conferred by the law of Virginia upon the county of Patrick in order to pay its subscription to the stock of this company, and not only was the exchange of these bonds for the stock within the just exercise of its powers, but it is further manifest that in no other way than by giving its commercial evidence of indebtedness could the county pay the subscription voted. It was an obligation unquestionably beyond the immediate power of the county to meet by taxation, and was for a public improvement, the benefit of which would be extended over the period of many years. Hence the case falls clearly within the express language of this Court, used in the case of Mayor *vs.* Ray, *supra*, and which holds in terms that where the object is an extensive public work "the expense of which is beyond the immediate resources of reasonable taxation and capable of being fairly and justly spread over an extended period of time," the power to borrow money necessarily carries with it the right to issue proper negotiable securities in payment for the subscription.

In Commonwealth *ex rel* Reinboth, *vs.* Councils of Pittsburgh (41 Penn. State, 278), that Court held:

> "The power given to the corporation to subscribe was a power to create a debt, aad consequently to give an evidence of the debt. The authority given was to subscribe as fully as an individual; and as an individual (by agreement with the company) could have given his bond, the city corporation had the same power. That grants of powers to corporations are strictly construed in favor of the public, but it would be a perversion of the rules of permit a corporation to use it to defraud its creditors ~~or~~ to protect itself against its own assumed obligations. If they legally owe a debt, it follows that they can give a bond for it."

In Seybert *vs.* City of Pittsburgh (1 Wall., p. 272), the same question was presented, arising upon the same bonds issued by that city, and after quoting the decision of the State Supreme Court in the Reinboth case, *supra*, Mr. Justice Grier announced that "as this Court fully concur in the construction of the act made by the highest tribunal of the State of Pennsylvania, it was unnecessary to make further remark."

We submit that these cases are entirely apposite to the one at bar because the power given the county of Patrick to make a loan for the payment of this stock, was in effect an authority to evidence that loan and indebtedness by such form of commercial securities as would pass current in those money centers where alone the enterprise to be thus aided could find the necessary capital for its accomplishment.

And Judge Dillon concludes a faithful analysis of the authorities upon this question in his excellent work upon Municipal Corporations (Vol. I, ed. 1881, sec. 125, par. 4), thus:

> "*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."

And amongst the citations of numerous cases to support this view he gives such of the decisions of this Court above cited as had then been rendered.

Finally, this question is removed from the domain of argument here by the act of the General Assembly of Virginia, passed April 20, 1867, chapter 60, (and before the issue of the bonds here in suit), which provides:

> "1. *Be it enacted by the General Assembly, that it shall be lawful for any city, town or county, which may have heretofore or which may hereafter subscribe, under the laws of the Commonwealth, to the capital stock of any internal improvement company, to borrow money at a rate of interest not exceeding ten per centum per annum, for the purpose of paying such subscriptions of stocks, and to issue their bonds, coupon or registered for such loans.*
>
> "2. *This act shall be in force from its passage.*"

IV.

It is therefore respectfully submitted:

First. That this Court has jurisdiction of this cause, both under Section 639 of the Revised Statutes, and because of the negotiable character of the obligations in suit, and—

Second. The bonds here involved are such negotiable obligations issued by competent authority as in the hands of the plaintiffs in error, render them free from any possible equities which may exist as between the County of Patrick and its immediate payee.

Wherefore, we submit, the judgment below should be reversed.

Respectfully submitted.
A. T. BRITTON,
A. B. BROWNE,
HENRY WISE GARNETT,
Attorneys for Plaintiffs in Error.

APPENDIX.

CHAPTER 41.—*An Act to amend the 46th, 47th, 48th 49th 50th and 51st sections of chapter 61 of the Code of Virginia, edition of 1860. Passed January 8, 1867.*

1. Be it enacted by the General Assembly, That the forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth and fifty-first sections of chapter sixty-one of the Code of Virginia, edition of eighteen hundred and sixty, be amended and re-enacted, so as to read as follows:

"Sec. 46. When a joint stock company shall have been incorporated to construct a railroad or turnpike through, by or near to any county, city or town, likely to be benefitted thereby, the court of such county, city or town may make an order requiring the sheriff or sergeant and commissioners of elections, at the next general election for members of the General Assembly, or at any other time, not less than one month from the date of the order, which shall be designated therein, to open a poll and take the sense of the persons qualified to vote for members of the General Assembly of such county, city or town, on the question, whether the said court, on behalf of such county, city or town, shall subscribe to the stock of such company. The said order shall state the maximum amount proposed to be subscribed, which, in no case, shall exceed one-third part of the stock to be subscribed by others than the State.

"Sec. 47. The commissioners of elections, after taking an oath fairly to take and return the poll, shall open poll books at the court-house of the county, city or town, and at the other places therein at which separate elections for members of Assembly are held, and shall cause to be entered upon such books, in a column to be headed "subscription," the names of the persons qualified to vote for members of the General Assembly of the county, city or town, who attend and are in favor of the subscription; and shall cause to be entered upon said books, in another column, to be headed "no subscription," the names of the said voters of the county, city or town, who attend and are opposed to the subscription. The commissioners who take the said polls shall certify them, and within five days after the day they were taken return them to the clerk of such Court.

"Sec. 48. If by the said poll books it shall appear that three-fifths of the persons qualified to vote for members of the General Assembly, voting upon the question, are in favor of the subscription, the said Court, at its term next after taking the said polls, or at any other term thereafter, shall make an order requiring the sheriff or sergeant to summon the acting justices thereof to attend the next succeeding term of the Court, or any other term thereafter to be named in said order, or in the case of a city or town, the common council or other proper authorities of such city or town, to carry out the wishes of the persons qualified to vote for members of the General Assembly.

"Sec. 49. The acting justices being summoned as directed in the preceding section, and a majority being present, or in the case of a city or town, the common council or other proper authorities of such city or town, shall have power to determine what amount of the capital stock (not exceeding the maximum mentioned in section forty-six of this chapter) shall be subscribed for on behalf of such county, city or town, and shall enter of record the amount so agreed to be subscribed; and thereupon, shall appoint an agent to make the subscription, to be paid in such instalments as may be agreed upon by said court, council or other authorities as may be called for by said company.

"Sec. 50. For the purpose of paying the quotas on said stock as they may be called for, or the instalments of such subscriptions as they may fall due, the court, council or other authorities, at the time when such subscription shall be made, shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such county, city or town; and at the time at which it makes its levy for such county, city or town, shall levy on all the lands and all other subjects liable to state tax and county or corporation levy in such county, city or town, such tax, to pay the amount of such subscription, or of such loan or loans as may be authorized, and the interest thereon, as said court, council or other authorities may deem necessary and proper; and from year to year repeat such assessments until the subscription or loan made by such court, council or other authorities, together with all interest, is fully paid. But such levy, for a year, shall not exceed one-fifth of the whole amount of such subscription.

Sec. 51. The right to stock in any company subscribed by any county, city or town, under the authority of the two preceding sections, shall vest in such county, city or town. And the Court of such county, or the council or other authorities of such city or town, shall have power from time to time to appoint a proxy to represent the stock in the meetings of the stockholders of the company, and also an agent to collect the dividends on its stock; which dividends, when collected, the said Court, council or other authorities shall annually apply to the diminution of the levy in such county, city or town. Nothing herein contained shall interfere in any manner with, or alter the charter of, any city, town or corporation heretofore granted."

2. This act shall be in force from its passage.

CHAPTER 164.—*An Act to incorporate the Norfolk and Great Western Railroad Company. Passed February* 6, 1867.

1. Be it enacted by the General Assembly of Virginia, That it shall be lawful to open books of subscription in the city of Norfolk, under the direction of George Blow, Jr., William Lamb, Gilbert C. Walker, W. C. Marrow and Charles Sharp, or any two of them; in the town of Portsmouth, under the direction of G. W. Grice, G. M. Bane, Jr., Arthur Emmerson and Thomas B. Butt, or any two of them; in the county of Nansemond, under the direction of John R. Kilby, W. B. Whitehead, Nat. Riddick and T. J. Kilby, or any two of them; in the county of Southampton, under the direction of P. J. Holmes, S. B. Kello, Benjamin Pope, G. F. Urquhart, or any two of them; in the county of Greenesville, under the direction of John R. Chambliss, William S. Goodwin, John W. Potts and Edward C. Land, or any two of them; in the county of Brunswick, under the direction of J. Ravenscraft Jones, E. R. Turnbull, David Meredith, W. H. E. Merritt, or any two of them; in the county of Mecklenburg, under the direction of William Townes, William D. Haskins, Robert Overby, Tucker Carrington, N. Alexander, Jr., Thos. F. Goode, E. A. Rawlings, William Baskerville, Jr., or any two of them; in the

county of Halifax, under the direction of William Carrington, W. I. Owen, R. V. Watkins and T. I. Flournoy, or any two of them; in the county of Pittsylvania, under the direction of E. F. Keen, S. D. Jones, George C. Cabell, or any two of them; in the county of Henry, under the direction of G. W. Booker, William Martin, J. M. Smith, Christopher Thomas and J. W. Smith, or any two of them; in the county of Patrick, under the direction of W. F. B. Taylor, Samuel Staples, T. J. Penn, W. C. Staples, F. T. Lawson, J. T. Barksdale, or any two of them; in the county of Carroll, under the direction of I. F. Woltz, James Early, James Wilkerson, T. M. Dobyns and J. W. Green, or any two of them; in the county of Floyd, under the direction of Joseph I. Howard, Jackson Godby, Samuel Dobyns, T. W. Williamson, or any two of them; in the county of Grayson, under the direction of James Anderson, J. M. Dickinson, William R. Dickey, I. H. Brant, S. F. Anderson and J. W. Parsons, or any two of them; in the county of Washington, under the direction of Valentine Kebler, Phillip Rohr, I. F. Johnson, or any two them; in the town of Danville, under the direction of Thomas P. Atkinson, William T. Sutherlin, William T. Clarke, Harrison Robinson, John W. Holland, G. W. Dead and Green T. Pace, or any two of them; and in such other places, and under the direction of such other agent or agents as a majority of the commissioners appointed for the city of Norfolk shall designate, for the purpose of receiving subscriptions to an amount not exceeding ten millions of dollars, in shares of one hundred dollars each, to constitute a joint capital stock for the purpose of constructing a railroad from the city of Norfolk *via* Danville, to some point on the Virginia and Tennessee Railroad, not east of Glade Springs, and for providing everything necessary for convenient transportation on the same.

2. Whenever one hundred thousand dollars of stock shall have been subscribed, the subscribers, their executors, administrators and assigns, shall be, and they are hereby declared to be a body politic and corporate, under the name and style of the Norfolk and Great Western Railroad Company; and shall be subject to all the provisions of the Code of Virginia, and other general laws applicable to internal improvement companies, except so far as the same may be inconsistent with the provisions of this act.

3. If the capital stock of the said company shall be deemed insufficient for the purposes of this act, it shall and may

be lawful for the directors, or a majority of them, from time to time, to increase the same by the addition of so many shares as they may deem necessary; for which they may, at their discretion, cause subscriptions to be received in such manner as may be prescribed by them, or may sell the same for the benefit of the said company, for any sum not under the par value thereof; and the said directors, or a majority of them, shall, by and with the consent of the stockholders in general meeting assembled, have power to borrow money for the purposes of this act, to issue proper certificates of such loans, and to pledge the property of the company by mortgage or otherwise, for the payment of the same, and the interest that may accrue thereon: provided, the interest shall not exceed ten per centum per annum.

4. It shall be lawful for said company to receive not exceeding two millions of acres of land in payment for subscriptions of stock: provided, however, that it shall not be lawful for said company, at the expiration of ten years after the completion of this road, to hold more land than shall be necessary for the use of the road.

5. The said company shall not refuse to allow any railroad already built, or which may hereafter be built, to connect with its road; and shall, jointly with such other road or roads, make suitable arrangements for the convenient transfer of freight from one road to the other; and when such road may be of the same gauge, shall not refuse a free interchange of freight cars, upon reasonable terms; that, with the concurrence of such road or roads leading to Lynchburg, Richmond or Petersburg, the freight tariffs shall be so arranged that no local freight sent to or received from either of the above-named places shall be charged a higher price per ton per mile than if sent to or received from Norfolk; and no through freight shall be charged a higher price, if sent to either Richmond or Petersburg, than if sent to Norfolk: provided that such connecting road or roads shall agree to *pro rate* upon fair terms; and if the connecting companies shall not be able to agree upon such terms, the question shall be referred to the Board of Public Works, and its decision shall be binding upon the parties.

6. That the commissioners appointed for the City of Norfolk shall be known as a Central Board of Commissioners, a majority of whom shall form a quorum for the transaction of business. They shall have authority to appoint an agent to solicit subscriptions, to have such preliminary sur-

vey made as they may deem important, and to collect instalments, not exceeding in the aggregate 5 per centum upon the subscriptions to the capital stock of the company, out of which they shall pay all salaries and other charges incurred by them for the benefit of the company.

7. That each subscription to the capital stock of the said company shall be binding from the time of making it; that in paying the last instalment on each share a credit of eight per centum per annum shall be allowed on all previous payments from the date of payment; that all liabilities incurred by the central board of commissioners, in compliance with the sixth section of this act, shall be borne *pro rata* by the subscribers to the capital stock, and if any subscriber shall have paid more than his fair proportion of such liability, the excess shall be refunded to him.

8. That the said company shall have authority to make an arrangement with the Norfolk and Petersburg Railroad Company for the use of its road, from some point near Suffolk to Norfolk, and such agreement shall release the said company from its obligation to complete its road to Norfolk within the time hereinafter specified.

9. That the said company shall commence its road within two years, and complete it within ten years from the passage of this act; and upon failure to comply with either of the above requirements, it shall forfeit all the rights and privileges conferred by this act, and the State shall have the right to take possession of the said road and other property of the company upon paying a fair price for the same.

10. This act shall be in force from its passage.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 57.

W. S. GURNEE, Jr., and A. C. GURNEE,
PLAINTIFFS IN ERROR,
vs.
THE COUNTY OF PATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF VIRGINIA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
HENRY WISE GARNETT,
Attorneys for Plaintiffs in Error.

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REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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vs.
The County of Patrick.

In Error to the Circuit Court of the United States for the Western District of Virginia.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The suggestion of opposing counsel that the Norfolk and Great Western Railroad was never constructed is not a fact shown by this record, and hence forms no part of the case before this Court. The validity and character of the bonds must be determined by the law and facts existing at the time of their issue.

The Code of Virginia of 1873 (chapter 47, secs. 11–15) requires formal demand upon the county—through its Board of Supervisors—for the payment of the interest in suit. The original payee of the bond, the Norfolk and Great Western Railroad Company, was joined with these plaintiffs in error in making that demand. But the demand was also made in terms in the separate names and on behalf of the Gurnees. This was purely formal, and the name of the company was used in the alternative, solely to avoid any possible technical objection upon the *form* of such demand. The appeal from the action of the board was also taken in such alternative form. But the suit was brought in the names of the Gurnees alone, and all subsequent proceedings were taken in their names. The alternative form in which the demand was presented and appeal taken in no manner justifies the assumption of opposing counsel that the plaintiffs in error then, or at any time, regarded the bonds as non-negotiable.

Answering the opposing counsel in the order of the propositions which he states his purpose to maintain, we submit in reply to the first:

I.

"*That the case was improperly removed to the United States* "*Circuit Court.*"

Authority for removal under Section 639 Revised Statutes is denied primarily upon the ground that as the railroad company was made a party to the original demand and appeal, and it being a Virginia corporation, the pending suit is not one in which the parties on the one side are all citizens of a different State from those on the other. If the alternative form in which the demand and appeal was presented can be treated as bringing the railroad company in as a party, it is certain such company is a mere nominal party; and if on the admission of opposing counsel (brief, p. 10), not only unnecessarily, but improperly joined, it is manifest the citizenship of the *actual* parties herein is diverse, within the full meaning of the law. Such real parties were the Gurnees, on the one side, as citizens of New York, and the County of Patrick, a municipal corporation of Virginia, upon the other.

And as upon the admission of opposing counsel, the railroad company was in no sense a necessary party, and as the use of its name was only a matter of form and out of abundant precaution, and as the suit proceeded after reaching the court, in the name of the Gurnees alone as the actual parties plaintiff, it is manifest the argument of opposing counsel does not apply, even assuming it necessary to continue the name of the company as a nominal party, it being in no wise interested in the subject-matter of the suit.

The citizenship of nominal parties is held by this Court not to control the question of federal jurisdiction. The entire doctrine is clearly stated in Walden *vs.* Skinner, 101 U. S., pp. 577, 589, thus:

> "Where the real and only controversy is between citizens "of different States, or an alien and a citizen, and the plaintiff "is by some positive rule of law compelled to use the name of "another to perform merely a ministerial act, who has not nor "ever had any interest in or control over it, the courts of the "United States will not consider any others as parties to the "suit than the persons between whom the litigation before "them exists. McNutt *vs.* Bland, 2 How., 9, 15; Browne *vs.* "Strode, 5 Cranch, 303; Coal Company *vs.* Blatchford, 11 "Wall., 172, 177.
>
> "Cases arise in the federal courts in which nominal or even "immaterial parties are joined, on the one side or the other, "with those who have the requisite citizenship to give the "Court jurisdiction in the case; and where that is so, the "rule is settled that the mere fact that one or more of such "parties reside in the same State with one of the actual "parties to the controversy will not defeat the jurisdiction of "the Court. Decisive authority for that proposition is found "in a recent ruling of Mr. Justice Miller, in which he states "to the effect that mere formal parties do not oust the juris-"diction of the Court, even if they are without the requisite "citizenship, where it appears that the real controversy is be-"tween citizens of different States. Arapahoe County *vs.* "Kansas Pacific Railway Co., 4 Dill., 277, 283."

Opposing counsel suggest that the proceeding was not a suit. He insists that it could not become such within the Removal Act unless based on an independent action brought against the county upon refusal of the board to honor the demand presented; and that the mere appeal from the board's refusal to the county court does not make a suit within the meaning of the Removal Act.

We print as appendix hereto that portion of the Code of 1873 which relates to the subject of demand for payment of county obligations and the judicial remedy given on refusal of payment. Section 14 thereof requires every claim or demand "other than a county order" to be presented to the Board of Supervisors before any action thereon can be maintained. Section 15 provides in terms that on refusal of such demand by such board its action is a finality, and the claim cannot be sued upon nor recovered in any court unless the party in interest appeals directly to the county court or by consent of the county, is permitted to bring an original action. Hence, the only statutory remedy given as matter of right is by way of direct appeal. When so taken, as in this case, the matter becomes a suit or controversy pending in a judicial tribunal, and subject to its ordinary rules and forms of procedure. Hence, the assertion of counsel that the plaintiffs in error, upon disallowance of their appeal might have brought original action in the State courts, is distinctly negatived by the positive terms of the law. They could do so only with the prior consent of the county. The sole absolute statutory remedy secured to them was by way of appeal.

The assumption that the declaration in debt filed by plaintiffs in error was unauthorized, is clearly incorrect. When the case reached the courts in the precise form directed by the statute, it then became necessary to pursue judicial forms. Pleadings were required to present an issue of either fact or law for judicial determination. The court could not know on a mere statement of account, and the appeal from the board's rejection thereof, on what grounds the plaintiffs rested their demand. The original declaration was filed by the express order of the Circuit Court on the docketing of the cause therein. (Rec., p. 1.)

The assertion that leave was given the plaintiffs to amend the declaration, in order to cure this assumed defect, is likewise erroneous. Such leave (Rec., p. 23,) was to "amend "their declaration," and to permit defendant to file pleas thereto. But the declaration was never so amended. The case stood upon the original declaration filed by express permission of the circuit court, and was met by the demurrer of the county; and on which declaration and demurrer the judgment of the circuit court upon the merits was entered. (Rec., 24.)

There is nothing in this record to show that this objection was in any form presented in the court below.

II.

Counsel further contend—

"That the justices of Patrick County had no authority to issue "the bonds to the railroad company, and they are void."

The substance of this contention is that the county was not authorized to exchange its bonds for the stock of the company; that the bonds should have been sold by the county, or the money borrowed by the county and paid to the company upon the county's subscription to the stock.

This contention is answered by the citation of authorities in the original brief, to wit: Meyer *vs.* Muscatine, 1 Wall., p. 384; Venice *vs.* Murdock, 92 U. S., 501.

Against these authorities counsel cites the case of Scipio *vs.* Wright, 101 U. S., 665.

Examination of that case will show that it arose in the State of New York under a statute of that State which in terms required the money to be borrowed by the county and to be paid over to the president and directors of the company and expended by them in "grading, constructing and maintain-"ing" the railroad in question. This Court held that as the highest court of New York had upon this statute ruled against the power of the municipality to make exchange of its bonds for the stock of the company, such construction of the State statute by the highest court thereof, was controlling upon this Court. In concluding its review of the New York decisions, this Court said:

> "We find no decision of the Court of Appeals that is in
> " conflict with what was ruled in the cases we have cited, or
> " which weakens their authority, *and as they are constructions*
> " *of a State statute, we are constrained to follow them.*"

Contrast the decision in this case with the language of this Court in Venice *vs.* Murdock, 92 U. S., 501, where, in refusing to follow the New York decisions on certain general questions, this Court said:

> "They assert general principles, to wit, that persons em-
> " powered to borrow money and give bonds therefor, for the
> " purpose of paying it to an improvement company, are not
> " authorized to deliver the bonds directly to the company, *a*
> " *doctrine denied in this Court, in the Supreme Court of Penn-*
> " *sylvania, and even in the Court of Appeals of New York.*
> " People *vs.* Mead, 24 N. Y., 124; the Town of Venice *vs.*
> " Murdock *et al.*, 62 id., 462."

We add, however, that the same learned Justice (Mr. Justice Strong,) rendered the opinion of this Court in both cases of Venice *vs.* Murdock and Scipio *vs.* Wright.

It thus plainly appears that the law as declared by this Court sustains our contention, and the case of Scipio *vs.* Wright, whilst asserting the opposite conclusion, is made plainly to depend solely upon the controlling construction given to the statute therein in question, by the highest Court of that state (N. Y.).

III.

Counsel further contends under heading IV (p. 15) that the county had no authority to issue its bonds, negotiable or otherwise, to the Norfolk and Great Western Railroad Company.

Much of the argument under this head has been answered in reply to the last proposition. The case of Hill *vs.* City of Memphis, 134 U. S., 198, and others cited under this head, are fully discussed in our original brief. We therein show that this case falls within the exception recognized in each of such decisions, and not within the principle therein announced denying the power of the municipalities to issue these forms of obligation without legislative authority. And finally we quote at length in our original brief (p. 34) the Act of the General Assembly in express terms authorizing the issue of the bonds here in suit.

IV.

Counsel further contends under heading V (p. 28) that the plaintiff in error had full knowledge of the invalidity of the bonds.

The assertion that because the plaintiffs in error bought them after interest thereon was due and unpaid, and knew from their face that they were issued without authority, stands without basis of either law or fact.

In Cromwell *vs.* County of Sac, 96 U. S., 51, this Court held, in terms, that non-payment of interest does not create such dishonor of the principal debt as to render the security in the hands of *bona fide* purchasers subject to any prior existing equities.

The Statute of Virginia plainly authorized the issue of these bonds, and, following the decisions of this Court, which held the exchange of bonds for stock to be fully authorized, these plaintiffs in error had a right to assume that they were issued by full authority, and were valid negotiable instruments.

V.

The remaining points made by the brief relate to the negotiability of the bonds. To this we reply as follows:

Answering the contention that the bonds in suit are controlled by the law of Virginia in requiring them to be payable at a particular bank for discount and deposit, etc., in order to render them negotiable, it is respectfully submitted that the Statute of Virginia upon this subject has no relation whatever to these municipal bonds.

The Code of 1860, chapter 144, section 7, (which was the statute law of Virginia when the bonds in suit were issued,) provides thus:

> "Every promissory note, or check for money, payable in "this State, at a particular bank, or at a particular office "thereof for discount and deposit, or at the place of business of "a savings institution or savings bank, and every inland bill of "exchange payable in this State, shall be deemed negotiable, "and may, upon being dishonored for non-acceptance or non-"payment, be protested and the protest be in such case "evidence of dishonor, in like manner as in the case of a "foreign bill of exchange."

The bonds here in question are neither within the letter nor spirit of this law. The Legislature was therein dealing only with the cases of individuals or private corporations, and for the security and convenience of all parties, imposed the condition of a certain place of payment in order to make the note negotiable. Manifestly its aim was to provide that such character of indebtedness should not go upon the commercial market except with such certainty of place of payment as to make the matter of demand, notice and protest within the certain reach of the holder.

But that provision was in no sense necessary with respect to the bonds of Patrick County. That county had a known existence. Its officers had an official place of residence. The bonds of the county here in suit were payable at the county seat and at the office of the treasurer of the county thereat, by clear intendment of law, as certainly as if it had been so expressed in the instrument. The law of Virginia with respect to promissory notes in this particular has, neither in letter nor spirit, any reference to the obligations of municipal corporations such as are here involved. It would be quite as proper to say that the bond of the State was not negotiable, because not made payable at a particular place, or that the similar obligation of the city of Richmond, under similar conditions, was subject to like construction. Where municipal corporations are established by law, with officers for the transaction of their business known to the whole world; with a certain place of official residence, in each instance likewise certainly known, it is idle to say that the corporation may escape payment upon the sole plea that its promises to pay, lawfully issued and in the hands of innocent parties, may be declared invalid upon the ground that there was not in express terms put in the instrument a designated place of payment.

On the contrary, the courts have held that such obligations are payable by the treasurer of the corporation and at the treasury of the corporation. Some authorities even hold that, in the absence of express statutory authority, no other place of payment can be lawfully designated.

Thus, in Prettyman *vs.* Supervisors of Tazwell County, 19 Ill., 406, it was held:

> "The only remaining question is, whether the county has "the power to make the principal of these bonds payable at "any other place than at its treasury. This is determined by "the third section of the act of 16th February, 1857, (Private "Laws, 1,032,) which provides 'that the County Court of each "'county which may, by a vote of said county, have subscribed "'or may hereafter subscribe to the capital stock of said com-"'pany, is hereby authorized to make the interest on the bonds "'of subscription aforesaid payable at such place or places as "'the said County Courts, respectively may order and deter-"'mine.'"
>
> "This enactment only authorizes the county to make the "interest payable where they may order, but gives no such "power as regards the principal. When the Legislatures ex-"pressly mention the interest alone, the inference is strong "that they intended to exclude the principal from the pro-"vision. If the interest were payable at the county treasury, "bondholders would be subjected to the inconvenience and "expense of semi-annually applying in the county for their

"interest. This would necessarily depreciate the market value "of the bonds, while merely having to present the bonds there "at maturity would not have that effect. These were probably the reasons that induced the Legislature to make the "distinction."

And in People *ex rel.* Peoria, &c., R. R. Co. *vs.* County of Tazwell, 22 Ill., 147–152, it was held:

"States, counties and corporations created for public convenience only, are not required to seek their creditors, to "discharge their indebtedness, but when payment is desired. "the demand should be made at their treasury. That is the "only place where the treasurer can legally have the public "funds with which he is intrusted. To authorize the auditor "to draw his warrants on the treasurer, payable in a sister "State, or in a foreign country, necessarily imposes an obligation on the treasurer to provide funds at that place to meet "them. And his duties requiring him at the treasury would "require the employment of agents, the transmission of funds "at a risk of loss, and at a considerable expense, on charges "insurance and discounts, which are not incident to its payment at the treasury. And the same reasons apply with "equal force to cities, counties and public corporations of a "similar character. The legislature has conferred no such "general power on such bodies, and in its absence they have "no power to make their indebtedness payable at any other "place than at their treasury."

VI.

The use of the word "registered" in the executed power attached to the bond does not destroy its negotiability.

There was no law of the State providing how these bonds should be registered, and the purchaser thereof on taking same, finding no statute which advised him how, when or to whom the bond was to be surrendered, was certainly justified in the conclusion that the word "registered" thereon was simply designed as a notification that the bond had been duly recorded somewhere in the records of the county. So far as the declaration in this case shows, the only bonds authorized to be issued by the county were those in payment of the original subscription. There being nothing upon the statute book nor shown by this record to establish any authority in the county to issue new bonds in lieu of those originally issued, we submit the word "registered" should properly bear the construction we contend for. In the absence of any law advising the purchaser how to proceed in order to secure an exchange of his bond for another running to himself, we submit with confidence the presumption should be indulged in his favor that the word was placed in the blank form of transfer solely as an assurance of the genuineness of the bond. It certainly ought not to be held that where the State law contains no provision with respect to the registration of such instruments issued by these municipal corporations, and there is nothing upon either the face or the back of the bond to inform the purchaser how to proceed in exchanging the security, or, indeed, showing that any procedure on his part was at all necessary, that the simple word "registered" destroyed the negotiable character of the instrument.

The case of De Voss *vs.* The City of Richmond (18 Grat., 339), so strongly relied upon by the other side, has no application whatever to the case at bar. Express recitals of that decision show that the ordinance of the City of Richmond adopted in terms the provisions of the State law with regard to the registration of the State bonds, and fully advised the purchaser and holder when, how and through whom the security should be exchanged by him for a new bond or certificate.

In the Cronin case (4 Hughes, 529), the learned circuit judge commits the same error in citing De Voss *vs.* City of Richmond, as applicable to the bonds of Patrick County, and places large reliance thereon in support of his decision against their negotiability. And other cases are cited therein to show that an assignee of a mere chose in action takes subject to all prior equities. That principle is not challenged by us, but its application to the case at bar is strenuously denied. Cases have been decided by this Court where the municipal bonds were issued as negotiable securities, and yet the law of the

State required their registration with the State auditor. Whilst the holder of such securities was, of course, bound to see that the law had been complied with and the bonds duly registered, these cases illustrate our contention here, to wit: that the requirement of registration being in such cases intended solely as an evidence of authenticity, the word "registered" on the bonds here in suit, in the absence of any statutory provisions to advise the purchaser of the mode of procedure, must be taken in the same sense and as proof only of their genuineness.

Rock County Township *vs.* Strong, 96 U. S., 271;
Lewis *vs.* Barber County, 105 U. S., 739;
Bissel *vs.* Spring Valley, 110 U. S., 162.

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A. B. Browne,
Henry Wise Garnett,
Att'ys for Pl'ffs in Error.

APPENDIX.

CODE OF VIRGINIA, 1873.

Chapter 47; pp. 440–443.

OF TOWNSHIP OFFICERS; THEIR DUTIES AND COMPENSATION.

* * * * *

6. The said board of supervisors of each county of the State shall have power at said meeting in December, or at any other legal meeting—

* * * * *

Second. To examine, settle, and allow all accounts chargeable against such county, and when so settled they may issue county warrants therefor, as provided by law. But the board of supervisors of any county shall not issue in any one year a greater amount of county warrants than the amount of county tax levied in such county for such year; and no interest shall ever be paid by any county on any county order.

* * * * *

What accounts to be allowed: attorney for Commonwealth to represent county before board; appeals, how taken.

10. No account shall be allowed by the county board of supervisors unless the same shall be made out in separate items, and the nature of each item specifically stated; and where no specific fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be verified by affidavit, to be filed therewith. The attorney for the Commonwealth shall represent the county before said board; and it shall be his duty to resist the allowance of any claim which is unjust, or not before the board in proper form and upon proper proof, or which for any other reason ought not to be allowed; and

when any claim has been allowed by said board against the county, which is in the opinion of said attorney improper or unjust, or from which he shall be required to appeal by any six freeholders of the county, the said attorney shall appeal from the decision of such board to the county court of said county, causing a written notice of such appeal to be served on the clerk of such board within thirty days after the making of such decision, and giving the party in whose favor the said claim may have been allowed, like notice of thirty days after the making of such decision; except that in case where the decision complained of is upon an order made by the county court or the judge thereof, or in a case involving the constitutionality or validity of an ordinance or by-law of a corporation, the appeal may be taken to the circuit court having jurisdiction over said county or corporation.

When accounts disallowed; appeals; costs; duty of clerk of board, upon appeal.

11. Nothing in the preceding section shall be construed to prevent any such board from disallowing any account, in whole or in part, when so rendered and verified, nor from requiring any other or further evidence of the truth and propriety thereof, as they may think proper.

12. When any claim of any person against a county shall be disallowed, in whole or in part, by the board of supervisors, such person may appeal from the decision of such board to the county court for the same county, by causing a written notice of such appeal to be served on the clerk of such board within thirty days after the making of such decision, and executing a bond to such county, with sufficient security, to be approved by the clerk of said board, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant by the court, except that in a case where the decision complained of is upon an order made by the county court, or the judge thereof, or in a case involving the constitutionality or validity of an ordi-

nance or by-law of a corporation, the appeal may be taken to the circuit court having jurisdiction over said county or corporation.

13. The clerk of the board, upon any appeal being taken, shall immediately give notice thereof to the attorney for the commonwealth, and shall make out a brief return of the proceedings in the case before the board, with their decision thereon, and shall file the same, together with the bond, and all the papers in the case in his possession, with the clerk of such court; and such appeal shall be entered, tried and determined, the same as appeals of right from an order of a county court in a controversy concerning a will, and costs shall be awarded thereupon in like manner: provided, that if the claim be not of greater value than twenty dollars (exclusive of interest), then the decision of the county court shall be final.

When action may be maintained.

14. No action shall hereafter be maintained by any person against a county, upon any claim or demand other than a county order, until such person shall have first presented his claim to the board of supervisors of such county for allowance.

When determination of board is final.

15. The determination of the board of supervisors of any county, disallowing, in whole or in part, any claim of any person, shall be final and conclusive, and a perpetual bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision and determination of such board of supervisors, or unless such board of supervisors shall consent and agree to the institution and maintenance of an action by such claimant against such county: provided, however, that when the board of supervisors shall refuse or neglect to act upon any claim duly presented to them, this act shall not be so construed as to prevent the institution and maintenance of an action by such claimant: provided further,

that if any judgment shall be recovered in any such action against any county, or against the board of supervisors, or against any other county officer in an action prosecuted by or against them or him, in their or his name of office, when the same should be paid by the county, no execution shall be issued upon such judgment, except as herein provided; but the same, unless reversed, shall be provided for by the board of supervisors in the next county levy; and the same shall be collected as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher therefor; but if payment thereof be not made before the first day of December next succeeding such levy, execution may be issued thereon by the court in which said judgment was rendered, or by the judge thereof in vacation.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 57.

W. S. GURNEE, Jr., and A. C. GURNEE,

PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF PATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF VIRGINIA.

Supplemental Brief for Plaintiffs in Error

ON

JURISDICTION.

A. T. BRITTON,
A. B. BROWNE,
HENRY WISE GARNETT,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

October Term, 1890.

No. 57.

W. S. Gurnee, Jr., and
A. C. Gurnee,
Plaintiffs in Error,
vs.
The County of Patrick.

In Error to the Circuit Court of the United States
for the Western District of Virginia.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR ON QUESTION OF JURISDICTION.

By permission of the Court:

STATEMENT.

This case was removed into the Circuit Court for the Western District of Virginia on May 6, 1884, by plaintiffs in error as citizens of New York, and under section 639 R. S. Attached to the petition for removal is the affidavit of each of these plaintiffs in error—

> " That he has reason to believe and does believe that from
> " prejudice and local influence the plaintiffs in said proceeding
> " or suit will not be able to obtain justice in the County Court
> " of Patrick County aforesaid."

Declaration was filed by leave of the court (Rec. p. 1), setting forth demand for the recovery of interest upon certain bonds issued by the County of Patrick, and treated by such pleading as negotiable securities. The declaration was met by demurrer of the county in the following form (Rec. supplement):

" DEMURRER.

"And the said defendant comes and defends the wrong or " injury and says that the declaration of the plaintiff and each " count thereof and the matters therein contained in manner " and form as the same are set forth are not sufficient in law " for the said plaintiff to prove or maintain his aforesaid " action against the defendant, and that the said defendant is " not bound by law to answer the same; and this he is ready " to verify. Wherefore, by reason of the insufficiency of the " said declaration and of each count thereof, the defendant " prays judgment, and that the said plaintiff may be barred " from having or maintaining his aforesaid action against the " defendant."

On these pleadings judgment was rendered by the Circuit Court on May 3, 1887, in the following form (Rec., 24):

" This day came the parties, by their attorneys, and in pur- " suance of an agreement by counsel submitted in vacation to " the judges of this court for their decision, the demurrer " filed by the defendant to the plaintiffs' declaration, and to " each count thereof, and the said defendant's demurrer to " the plaintiffs' declaration, and each count thereof, being " argued, and because it seems to the court that the plaintiffs' " declaration, and each and every count thereof *are* insufficient " in law, it is considered by the court that the demurrer afore- " said be sustained, and, the record showing that this court " has not jurisdiction of this case, it is ordered that the same " be remanded to the County Court of Patrick County, " Virginia.

" HUGH L. BOND, *C'r Judge.*
" JOHN PAUL, *Dist. Judge.*"

From this judgment the writ of error to this court was allowed (Rec. 25).

ARGUMENT.

I.

Is the jurisdiction of the Supreme Court herein taken away by the Act of March 3, 1887?

This cause was removed into the circuit court solely upon the ground that from prejudice and local influence a fair trial could not be had in the State court.

That ground was sufficient and exclusive.

Hess *vs.* Reynolds, 113 U. S., p. 73.

Upon such removal and for the cause stated the jurisdiction of the circuit court remained, irrespective of any question affecting the negotiable or non-negotiable character of the securities forming the subject-matter of the suit.

When this case was removed in May, 1884, the 5th section of the Act of March 3, 1875, 18 Stats., 472, permitted the circuit court to remand a case so removed when it should find that it did not involve a dispute or controversy properly within the jurisdiction of that court, but with the distinct proviso that: "The order of said circuit court dismissing or "remanding said cause to the State court shall be reviewable "by the Supreme Court on writ of error or appeal as the case "may be."

The Act of March 3, 1887, 24 Stats., p. 552, contains in section 2 the following provision:

> "Whenever any cause shall be removed from any State "court into any circuit court of the United States, and the "circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State "court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error "from the decision of the circuit court so remanding such "cause shall be allowed."

Does this provision control the case at bar? We respectfully submit that it does not.

Section 2 of the Act of 1887 deals in terms solely with cases "which may *now* be pending or which may *hereafter* be "brought in any State court," etc.

The conditions and terms of such removal being materially changed from those imposed by the provisions of the Act of March 3, 1875, it follows, as matter of principle as well as by the express language of the latter act, that it dealt, and was intended only to deal with causes *then* or *thereafter* brought in the State courts and *thereafter* removed into the circuit courts.

Such being both the language and obvious intention of section 2 of the Act of 1887, it follows that the provision therein, *supra*, denying review in this Court, applies only to cases then (at the passage of the act) pending or thereafter commenced in the State court, and removed hence to the circuit court. The language of the provision denying review of an order remanding the cause to the State court is in the present and future tense. It is, "whenever any cause shall be "removed," etc. The grammatical sense of this language clearly applies only to causes *thereafter* removed. And when taken in connection with the entire section, which deals in terms with cases "which may *now* be pending, or which may "*hereafter* be brought in any State court," this construction becomes a certainty.

The reason of the law supports this construction. When causes were removed into the federal court under the Act of 1875, the parties taking the benefit thereof did so upon the distinct statutory assurance that review could be had in this Court. When, therefore, Congress changed the law its language shows that it intended to do so only as to future litigants. Thereafter parties acted with notice. They were advised that if they wrongfully invoked the federal jurisdiction, an order remanding their cause to the State court would not be subject to review in this Court.

Tested by the language of the law and the reason of the law we submit our contention gives the true construction to the Act of 1887.

Furthermore, section 6 of that act, whilst repealing in terms the provisions of the Act of 1875 giving this Court jurisdiction over orders remanding causes to the State court, carries with such repeal the express proviso—

> "That this act shall not affect the jurisdiction over or dis-
> "position of any suit removed from the court of any State or
> "suit commenced in any court of the United States before the
> "passage hereof except as otherwise expressly provided in
> "this act."

Assuming our construction of section 2, of the Act of 1887 to be correct, and that denial of power in this Court to review an order remanding a cause must be restricted to cases *thereafter* removed into the Federal courts, we submit this proviso to section 6 preserves the federal jurisdiction in this case both in the circuit court and upon writ of error in this Court.

The "jurisdiction" thus preserved by the proviso to sec. 6, Act of 1887, is not restricted to the circuit court; *per contra*, the last paragraph of sec. 5, Act of 1875, dealt only with the power of review in *this* Court. Repeal of that provision with express saving of jurisdiction over causes *theretofore* removed, in terms and by intendment necessarily preserves the jurisdiction of this Court in such cases. Otherwise, the proviso cannot be brought into connection with the repealing clause in any form, nor given any effect.

Retroactive construction which will defeat federal jurisdiction is not required by the terms of the Act of 1887, and we respectfully submit is obnoxious to the established rule of statutory interpretation.

The case of Morey *vs.* Lockhart (123 U. S., 56, 57), does not militate against this view. Express recital of the opinion therein, is that the appeal was from an order of the circuit court remanding a suit which was begun in and had been removed from a State court *after* the Act of March 3, 1887, went into effect. Beyond question, the Act of 1887, operated in such a case to take away the jurisdiction of this Court.

Treating the judgment herein (*pro argumento*) solely as an order remanding the cause, it is therefore submitted that the jurisdiction of this Court thereover is not in any manner affected by the Act of 1887.

II.

The judgment of the circuit court was final upon the merits, and brings the case within the Act of February 25, 1889 (25 *Stats.*, 693.)

Whilst maintaining the jurisdiction herein as complete under foregoing construction of the Act of 1887, and denying that the question of jurisdiction can be raised after demurrer in any form, we submit in the alternative the controlling authority of the Act of 1889.

The Act of February 25th, 1889 (25 Stats., 693), provides:

> "That in all cases where a final judgment or decree shall be "rendered in a circuit court of the United States in which "there shall have been a question involving the jurisdiction of "the court, the party against whom the judgment or decree is "rendered shall be entitled to an appeal or writ of error to "the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; "but in cases where the decree or judgment does not exceed "the sum of five thousand dollars, the Supreme Court shall "not review any question raised upon the record except such "question of jurisdiction; such writ of error or appeal shall be "taken and allowed under the same provisions of law as apply "to other writs of error or appeals except as provided in the "next following section.
>
> "SEC. 2. That in cases of judgments or decrees mentioned "in the first section of this act, and heretofore rendered, where "the period of limitation for taking writs of error or appeals "in other cases has not expired, appeals or writs of error may "be sued out at any time within one year after the passage of "this act."

The judgment of the circuit court herein (Rec. 24.) was final in terms and in intendment.

Plaintiffs' declaration set forth a case arising upon certain securities declared thereon as negotiable. The diverse citizenship of the parties was likewise averred, and the cause was removed solely under the local prejudice act. Upon the face of the record the jurisdiction of the circuit court stood unquestioned, and the facts alleged therein *prima facie* established the plaintiffs' right of recovery.

Section 914 of the Revised Statutes provides:

> "The practice, pleadings and forms and modes of proceed-
> "ing in civil causes other than equity and admiralty causes
> "in the circuit and district courts, shall conform as near as
> "may be to the practice, pleadings and forms and modes of
> "proceeding existing at the time, in like causes in the courts
> "of record of the State within which such circuit or district
> "courts are held, any rule of court to the contrary notwith-
> "standing."

The Code of Virginia, (1873, title 51, chap, 167, sec. 20, p. 1092,) provides:

> "Where the declaration or bill shows on its face proper
> "matter for the jurisdiction of the court, no exception for
> "want of such jurisdiction shall be allowed unless it be taken
> "by plea in abatement. The plea shall not be received after the
> "defendant has demurred, pleaded in bar or answered to the
> "declaration or bill, nor after a rule to plead, or a conditional
> "judgment or decree *nisi*."

The Code of 1887 (section 3,260, p. 778,) contains the same provision with slight verbal alteration. The meaning is, however, unchanged.

In Washington & New Orleans Telegraph Company *vs.* Hobson and Son, 15 Gratt., 122, the Supreme Court of Appeals of Virginia, in construing this section, said:

> "I think it is quite clear that the circuit court committed
> "no error in overruling the motion to arrest the judgment.
> "Had the fact upon the assumption of which the motion was
> "grounded, namely, that the parties defendant 'to the action
> "'were residents of other and different States than Virginia,'

"been fully proved, it would have presented no reasons for "arresting the judgment. *No question of jurisdiction arising "upon such supposed fact could be made except by plea in abate-"ment offered before the defendant had pleaded in bar.* Code "ch. 171, sec. 19, p. 648."

And the same court, in Jones *vs.* Bradshaw *et al.*, 16 Gratt., 361, commenting on the above section, says:

> "It applies where the objection is for mere matter of abate-"ment; as where the case is a proper one for a court of "equity, *but not for the particular court in which the suit is "brought*, or where the suit ought to be abated by reason of "some circumstance attending the situation of the plaintiff or "the defendant, or the like."

These authorities are sufficient to show that in the case at bar the question of jurisdiction could only be raised by plea.

The general demurrer filed herein under the clear terms of of the Code, *supra*, was a waiver of all right to interpose any objection to the jurisdiction.

It is thus plain that under the law of Virginia on this subject (which by section 914, of the Revised Statutes controls the proceeding in the Federal court), as expounded by the highest court of that State, the question of jurisdiction could not be raised on the general demurrer filed.

That demurrer in terms challenged the declaration and each count thereof because "not sufficient in law," and thereon prayed "that the said plaintiff may be barred from having or "maintaining his aforesaid action against the defendant."

Responsive to that form of plea and which raised solely an issue of law to be determined by the court, the circuit court (Rec. 24,) gave judgment in form and language as broad as the demurrer and the issue thereby tendered, holding:

> "That the plaintiffs' declaration and each and every count "thereof are insufficient in law; it is considered by the court "that the demurrer aforsaid be sustained."

The finality of this judgment upon the merits is well settled.

"It seems to be agreed as a general rule that a judgment "on a demurrer, is as conclusive and binding as if the same "had been after a verdict." Bacon's Abr. Title Pleas, N.

In Tucker's Commentaries on the Laws of Virginia, vol. 2, p. 268, that learned author, whose commentariess are accepted by the courts and bar of Virginia without question, observes:

"With these qualifications, however, it may be remarked "that the judgment on demurrer is always as peremptory as "if it had been rendered upon a verdict found on an issue of "fact. The judgment when the defendant has demurred and "his demurrer is overruled, or where on the plaintiffs' demur-"rer, his plea, etc., are adjudged bad, and he does not obtain "leave to amend, is not that he shall answer over (*respondeat "ouster*), but it is that the plaintiff shall recover *So, too, the "judgment against the plaintiff on a demurrer is equally per-"emptory and final.* See Tidd's Prac. 478, 479."

In Henderson *vs.* Stringer, 6 Gratt., 130-133, the Supreme Court of Appeals of Virginia held:

"A demurrer to an entire declaration, whether general or "special, raises the question whether or no there be matter in "the declaration sufficient to maintain the action."

In Smith's Adm'r *vs.* Lloyd's, 16 Gratt., 295, 308, the same court said:

"It is true, as a general rule, on demurrer the court will "consider the whole record, and give judgment for the party "who, on the whole, appears to be entitled to it."

So in Roe *vs.* Crutchfield, 1 Hen. & Mum., 261, the same court long since held:

"That if one count in a declaration be good, though all the "rest be bad, there shall be judgment for the plaintiff upon a "general demurrer to the whole."

These citations confirm the statement of Tucker's Commentaries, *supra*, that the declaration of the court sustaining a general demurrer is a judicial decision to the effect that the plaintiff, upon the merits of the case, is not entitled to recover, and is therefore necessarily decisive of the cause. Thereunder the parties go hence without day.

In Rogers *vs.* Burlington, 3 Wall., 654, the suit was to recover on certain bonds issued by the City of Burlington. The declaration was met, as in this case, by the demurrer of the city, and thereon the decision of this Court recites:

> "Parties were fully heard in the court below, and the court "sustained the demurrer and rendered judgment for the de"fendants.
>
> "Plaintiff excepted to both those rulings, and a bill of ex"ceptions to that effect, in due form, is exhibited in the record; "but it is unnecessary further to advert to it, as it is well settled "that the ruling of the circuit court in sustaining or overruling "a demurrer to a declaration and rendering judgment for the "wrong party may be re-examined in this court by a writ of "error without any formal bill of exception."

In Suydam *vs.* Williamson, *et al.*, (20 How., 427), this court in treating at length of final judgments reviewable here said:

> "And the same effect is produced and the same object is at"tained when the defendant demurs to the declaration, or when "either party demurs to a material portion of the pleadings on "which the cause depends, and so it must have been under"stood by this court in Gorman *et al. vs.* Lenox, 15 Pet., 115, "where it was held, in accordance with the principle here ad"vanced, that the action of the circuit court of this District, in "sustaining a demurrer to a plea of performance in a suit on a "replevin bond, was the subject of revision on a writ of error; "and the rule adopted in that case was undoubtedly correct, "as the effect of the demurrer was to make the error apparent "in the record, and when that is so, it becomes the subject of "revision just as much as when it is made to appear by a bill "of exceptions or a special verdict."

The plaintiffs in error here stood upon this judgment sustaining the demurrer to the entire declaration, and sued out this writ of error therefrom. Clearly they considered and treated this judgment as final, as certainly it was final on the merits, because if leave to amend were thereafter permissible, they did not ask such leave, but made the judgment final by taking the cause to this Court. But under the law and practice of Virginia the judgment sustaining the demurrer against the plaintiff "is equally peremptory and final." Tucker's Commentaries, *supra*.

Hence, we submit the case falls within the Act of February 25, 1889. 25 Stats., p. 693.

How the question of jurisdiction may be raised thereunder is not important. It may be by plea or on the court's own suggestion. In any event, *if raised*, the law contemplates the judgment on the merits shall be reviewed by this Court where, as in this case, the amount in controversy exceeds $5,000.

The case of Richmond & Danville R. R. Co. *vs.* Thouron, (134 U. S., 45), has no application hereto. There the order of the circuit court simply remanded the cause, and appeal was taken therefrom under the Act of February 25, 1889.

But this Court dismissed the appeal on the obvious ground that a simple order remanding the cause was *not* "a final judgment or decree," and hence not within the stated act.

But in the case at bar final judgment was rendered sustaining the general demurrer which covered the entire merits of the action. The *addition* thereto of language denying the jurisdiction of the court presents, we submit, the very case covered by the letter and intent of the Act of 1889. The judgment on the merits clearly cannot be controlled by the remanding order therein.

If the court had jurisdiction to hear and determine the merits (as it certainly did so render judgment), its order remanding the cause was erroneous and a nullity. If it did *not* have such jurisdiction, its judgment was a nullity. But it *did* render judgment on the merits.

The question of jurisdiction, if properly raised under the law applicable hereto, presents a case coming clearly within the Act of 1889, and confers on this Court jurisdiction to hear and decide.

III.

The suit was removable under the law.

The appendix to our reply brief contains the law of Virgina, providing for demand on the County Board of Supervisors and appeal from such board to the county court.

Thereunder such appeal is "entered, tried and determined, " the same as appeals of right from an order concerning a will.' If the demand is $20 or less, the decision of the county court is final; but where the demand is greater, appeal lies to the circuit court, in analogy to section 3,45[illegible]. Code of 1887, p. 822, entitled "Appeals of right from County Court," which provides—

> " Any person who thinks himself aggrieved by an order in a " controversy concerning the probate of a will, or the appoint- " ment, or qualification of a personal representative, guardian, " curator, or committee, or concerning a mill, roadway, ferry, " wharf, or landing, may, in a county court, during the term " at which such order is made, appeal therefrom of right with " or without a *supersedeas*, as he may elect, on giving bond, as " prescribed by section 3,470."

Hence the proceeding is judicial, in a court having judicial powers—viz., matters of probate and criminal offences (Code of Virginia, 1873, tit. 49, chap. 154, p. 1,029); condemnation of land, violations of revenue laws, fishery laws, &c., &c. (Code 1887, Secs. 1,074, 532, 2,117.) And from its judgment appeal lies, *supra*.

The case of Delaware County Comm'rs *vs.* Diebold Safe & Lock Co., 133 U. S., 473, is upon facts, proceedings and conclusion identical with the case at bar. The analogy could not be more perfect.

The case of Upshur Co. *vs.* Rich, 135 U. S., 467, is entirely different. There the appeal was taken to correct an erroneous tax assessment—an administrative matter purely. The county court (as the opinion recites) had judicial powers solely in matters of probate.

This Court held the subject of tax assessment, whether in the county court or before the Board of Supervisors, to be purely an administrative matter and not a "suit" within the removal acts.

But in the case at bar, the controversy is a demand for the payment of a debt—the appeal to the county court the exclusive statutory remedy given; and the entire case is one of dispute—a controversy within the full meaning of the removal acts.

> "The modes of proceeding may be various, but if a right is "litigated between parties in a court of justice, the proceed- "ing by which the decision of the court is sought is a suit."
>
> Weston *vs.* City of Charleston, 2 Pet., 449, 464.

In Gaines *vs.* Fuentes, 92 U. S., 10, 21, 22, and Ellis *vs.* Davis, 109 U. S., 485, 497, it is held in terms that a contest concerning a will is a "suit." And in the case at bar the appeal is by law to be heard and determined "the same as "appeals of right from an order of a county court in a contro- "versy concerning a will."

It is submitted that the case at bar was properly removed; was heard and finally decided upon the merits by the circuit court and that this Court has jurisdiction thereover both upon such judgment or upon the order remanding the case to the State court.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 347.

WALTER S. GURNEE, Jr., et al., Assignees,

vs.

COUNTY OF PATRICK, VIRGINIA.

Proceeding to Recover Interest (and Interest on Interest) on Certain Alleged Registered Bonds.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR,

BY

John W. Daniel, *Attorney for the County of Patrick.*

JUDD & DETWEILER, PRINTERS.

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BRIEF FOR DEFENDANT IN ERROR,

BY

John W. Daniel, *Attorney for the County of Patrick.*

This case is misnamed. It is the case of " *The Norfolk and Great Western Railroad Company,[*] for the use and benefit of*

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* Note.—" The Norfolk and Great Western Railroad Company " here mentioned was a paper railroad that was never built. It must not be confounded with " The Norfolk and Western Railroad Company," which succeeded the Atlantic, Mississippi and Ohio railroad, and is an actuality, occupying another and different field from that contemplated by the plaintiff company.

Walter S. Gurnee, Jr., and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees," vs. *The County of Patrick, Va.*

It arises out of the illegal issue of $200,000 of county bonds by the justices of Patrick county to the railroad company named, in exchange for stock in said railroad company. No railroad was ever built, and the suit therefore involves a great county liability without a corresponding benefit.

For the defendant in error we maintain—

> 1. *That the case was improperly removed to the United States circuit court.*
>
> 2. *That the justices of Patrick county had no authority to issue the bonds to the railroad company, and they are void.*
>
> 3. *That the invalidity of the bonds is apparent from their face, and no holder of them can recover.*
>
> 4. *That the bonds are not negotiable in fact or in form, and the United States courts have no jurisdiction of the case.*
>
> 5. *That the demurrer to the declaration was properly sustained.*

I.

STATEMENT OF THE CASE.

In 1869, before the readmission of Virginia into the Union after the war, the justices of Patrick county illegally undertook to execute to the *Norfolk and Great Western Railroad Company* a large amount of county bonds in exchange for stock in said company. The interest on these bonds matured semi-annually, commencing, as alleged, November 1, 1869.

On the 18th April, 1870, as the plaintiffs allege, the Norfolk and Great Western Railroad Company hypothecated the bonds in suit as collateral security for a loan to Gaylord & Flannagan, and that firm caused them to be sold in New York to the assignees, who were plaintiffs below, default having been made by the railroad company in payment of the principal debt secured by their hypothecation. (See Record, page 20.) How much the bonds brought when thus sold we are not informed, the plaintiffs being content to allege that they purchased them "*for value.*"

Fourteen years after this transaction *and fourteen years after the default of the county court of Patrick in making the levy which the Code of Virginia contemplated in a proper transaction,* the bonds in suit turned up with a petition in behalf of—

> "*The Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees thereof.*"

The use of the name of the original obligee as a plaintiff and the designation of the Gurnees as "*assignees*" alike indicate that the parties did not regard the bonds as negotiable nor themselves as "*indorsees,*" but only as assignees of an ordinary non-negotiable bond.

This petition was filed at a meeting of the board of supervisors of Patrick county on April 7, 1884. Seventeen bonds for $1,000 each, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, 30, were presented and payment of interest was demanded from November 1, 1869, to November 1, 1883 (with interest on interest); in all, the sum of $21,751.05, or a levy of taxes for said interest.

The account presented is as follows:

Patrick County, Virginia, in Account with the Norfolk and Great Western Railroad Company, for the Use and Benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and the said Walter S. Gurnee, Jr., and Augustus C. Gurnee, Assignees of said Company.

To interest on seventeen bonds of Patrick county for one thousand dollars each from October 26th, 1868, to November 1st, 1869	$1,034 16
To interest from Nov. 1, '69, to Nov. 1, '83, 14 years	868 69
" on $17,000 to Nov. 1, '70, 1 year	1,020 00
" thereon, 13 years	795 60
" on $17,000 to Nov. 1, '71, 1 year	1,020 00
" thereon, 12 years	734 40
" on $17,000 to Nov. 1, '72, 1 year	1,020 00
" thereon 11 years, to Nov. 1, '83	673 20
" on $17,000, one year, to Nov. 1, '73	1,020 00
" thereon, 10 years	612 00
" on $17,000, one year, to Nov. 1, '74	1,020 00
" thereon, 9 years	550 80
" on $17,000, one year, to Nov. 1, '75	1,020 00
" thereon, 8 years	489 60
" on $17,000, one year, to Nov. 1, '76	1,020 00
" thereon, 7 years	428 40
" on $17,000, one year, to Nov. 1, '77	1,020 00
" thereon, 6 years	367 20
" on $17,000, one year, to Nov. 1, '78	1,020 00
" thereon, 5 years	306 00
" on $17,000, 1 year, to Nov. 1, '79	1,020 00
" thereon, 4 years	244 80
" on $17,000, one year, to Nov. 1, '80	1,020 00
" thereon, 3 years	182 60
" on $17,000, one year, to Nov. 1, '81	1,020 00
" thereon, 2 years	122 40
" on $17,000, one year, to Nov. 2, '82	1,020 00
" thereon, one year	61 20
" on $17,000, one year, to Nov. 1, '83	1,020 00
	$21,751 05

This account the "board of supervisors disallowed and refused to levy for in whole or in part." (Record, p. 10.)

Thereupon "*the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees of said bonds,*" gave notice of an appeal to the county court of Patrick county (Record, pp. 10, 11) April 7, 1884.

Thereupon an appeal bond was given, reciting that "*the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and* *said Walter S. Gurnee, Jr., and Augustus C. Gurney, assignees of said railroad company,*" had appealed, &c. (Record, p. 11), April 7, 1884.

On April 29, 1884, petition was filed in the county court of Patrick county by W. S. Gurnee, Jr., and Augustus C. Gurnee (*the name of the Norfolk and Great Western Railway Company, one of the complainants and appellants, being dropped as a party*) for removal of the cause to the circuit court of the United States for the western district of Virginia. This petition recited that Walter S. Gurnee, Jr., and Augustus C. Gurnee were "the appellants or plaintiffs in a certain suit or proceeding instituted *by them* against the county of Patrick, in the State of Virginia;" that they were then and at the time of its commencement citizens and residents of the State of New York, and that said suit was instituted to recover interest on *seventeen bonds* of the county of Patrick; that the amount in controversy exceeded five hundred dollars.

The affidavits and bonds given all treated the Gurnees as the parties plaintiff (or appellant), and the Norfolk and Great Western Railroad Company was dropped out of recognition as plaintiff or appellant.

On the 1st of July, 1884, the Gurnees filed a declaration in debt in the clerk's office of the circuit court for the western district of Virginia against the county of Patrick, and on the 7th of July, 1884, their counsel filed also the affidavit of B. F. Terry, taken before W. E. Craig, collector of the 5th district of Virginia, that he had served a copy of the declaration on John R. Moore, the attorney of the Commonwealth for Patrick county, and on L. G. Rucker, clerk of the board of supervisors.

In this manner the case of "*the Norfolk and Great Western Railroad Company, for the use of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees thereof,*" now become the case of "*Walter S. Gurnee, Jr., and Augustus C. Gurnee,*" was introduced into the circuit court of the United States for the western district of Virginia.

II.

THE SUIT WAS IMPROPERLY REMOVED TO THE UNITED STATES COURT.

The statute under which the right of removal from the Federal court is claimed is contained in the Revised Statutes of 1878, page 114, section 639, and is as follows:

> "SEC. 639. And suit commenced in any State court wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in said section:
>
> "First. * * *
>
> "Second. * * *
>
> "Third. Where a suit is between a citizen of the State in which it is brought and a citizen of another State it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.
>
> "In order to such removal the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him and of all pleadings, depositions, testimony, and other proceedings in the cause, or, in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall thereupon be the duty of the State court to accept the surety and to proceed no further

in the cause against the petitioner, and any bail that may have been originally taken shall be discharged.

"When the said copies are entered as aforesaid in the circuit court the cause shall then proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of the courts of such State if the cause had remained in the State court."

It is well settled that "a suit cannot be removed under the third subdivision of section 639 unless all the parties on one side of the controversy are citizens of different States from those on the other."

American Bible Society *vs.* Price, 110 U. S., 61.
Sewing Machine Companies, 18 Wall., 553.
Vannevar *vs.* Bryant, 21 Wall., 41.
Hancock *vs.* Holbrook, 119 U. S., 586.
Iron Co. *vs.* Ashburn, 118 U. S., 54.
Jefferson *vs.* Driver, 117 U. S., 272.
Myers *vs.* Swann, 107 U. S., 546.
Society *vs.* Grove, 101 U. S., 610.
Thouron *vs.* East T., V. & G. R. R. Co., 38 Fed. R., 673.

It is said by Judge Dillon:

"*All* must possess the requisite citizenship (that is, none of them must be citizens of the same State with the plaintiff), and ALL *must join in a petition* to remove the cause *on the ground of local prejudice.*"

Dillon's Removal of Causes, 5th ed., § 48.

Was the Proceeding a Suit?

1. The proceeding of appeal to the county court of Patrick was either a "suit" or *not* a suit. It can scarcely be called a suit in the sense of the removal statutes, as we conceive, but only a formal method of presenting the account under Virginia law, required as condition precedent to a

suit. A decision by the county court would not, in other words, have been *res adjudicata.*

By the Code of Virginia of 1873 (in force when this proceeding was instituted) provision is made for the presentation of itemized accounts against a county to the board of supervisors, and the attorney for the Commonwealth must appear and represent the county. (Code of Virginia of 1873, ch. 47, § 10, p. 442.)

Appeals lie from the board to the county court upon bond being given for their faithful prosecution and the payment of costs. (§ 12.)

Then it is provided:

> "§ 14. No action shall be maintained by any person against a county upon any claim or demand other than a county order until such person shall have first presented his claim to the board of supervisors of such county for allowance."

The proper procedure for the plaintiffs in this proceeding was this:

(1.) Upon disallowance of their account they might have brought action in the State courts—averring the disallowance by the board of supervisors of their account as the basis of jurisdiction.

(2.) They might then have made a motion to remove the case to the United States circuit court.

Instead of this they appealed to the county court, and it is this *appeal* that they have asked the United States circuit court to hear.

Had the appeal been decided against them they could then have brought action in the State court and moved for its removal.

They have proceeded irregularly.

If a Suit, it is the Suit of the Norfolk and Great Western Railroad Company for the Use, &c., and Cannot be Removed.

(2.) If the appeal to the county court be deemed a "suit," then we say that the parties who took the appeal and gave notice thereof should have joined in the petition for removal (see Dillon's Removal of Causes, § 48 and *ante*); and, as they could not do this by reason of the fact that all of them were not of a different State from the defendant, no removal could be had. The Norfolk and Great Western Railroad Company was a Virginia plaintiff and the county of Patrick a Virginia defendant, and the legal grounds of removal did not exist.

The notice for appeal, as will be seen from the record (page 11), is as follows:

> "You will please take notice that the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and said Gurnees, assignees of said company, by counsel, will appeal to the county court of Patrick county from the decision of the board of supervisors of Patrick county, Virginia, made at their meeting, at the court-house of said county, on the 7th day of April, 1884, refusing to provide for or levy the interest on seventeen bonds, of the denomination of $1,000, executed on the 27th day of August, 1869, by William Witt, presiding justice, on behalf of said county, and attested by J. L. Anglin, the clerk thereof, and payable to the Norfolk and Great Western Railroad Company or its assigns twenty years from the 26th of October, 1868, with interest thereon, at the rate of six per centum per annum, from the 26th of October, 1868, the interest accruing after the 27th of August, 1869, to be paid semi-annually on the 1st day of May and the 1st day of November in each year. Said bonds, which were purchased by and now belong to Walter S. Gurnee, Jr., and Augustus C. Gurnee, are numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29, and 30."

The appeal being then taken and becoming a suit in the name of "*the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and the said Gurnees as assignees of said company,*" cannot be changed into another or different suit, but must remain the same suit that it was when instituted in the county court of Patrick county by the appeal. Bringing the Norfolk and Great Western Railroad Company in immediate privity with the defendant by its very style and character, this privity cannot be obviated by flinging out two of the coplaintiffs and by the assuming of another and different relation by those of the plaintiffs who now claim as *bona fide* holders of a negotiable instrument.

Improper Joinder of Parties.

Furthermore, the assignor and the assignee were improperly joined, to begin with, as coplaintiffs. The assignor, the Norfolk and Great Western Railroad Company, had a right to sue for the benefit of the assignee, and under the Virginia statute the assignees had a right to sue in their own names as assignees; but the two—that is to say, the assignor and assignee—did not have the right to join in one suit. It was, therefore, a mispleading at the outstart, and it has never yet been properly corrected.

It is true that the Gurnees filed a petition for removal (Record, page 2), and afterwards filed a declaration in debt (Record, page 12) in the circuit court of the United States in their own names; but it was for the removal of that cause already pending, and they could not change its nature by dropping the names of its proper plaintiffs, nor had they any right whatsoever to file any declaration in debt. They had obtained no leave to do so, and, though leave was afterwards given—that is, in October, 1884—to amend the declaration, " providing the giving of such amendment be delivered to the defendant or its counsel within ninety days of the rising of the court," they never availed themselves of such leave. The declaration in debt has been interjected into the case without authority of court and without right of law. This was as irregular as if they were now to drop a new declaration into the record at this bar. Under these circumstances the defendant in error demurred to the declaration, and brought up, as we conceive, all questions which require the jurisdiction of the court to consider them.

III.

IT WAS ULTRA VIRES OF THE RAILROAD COMPANY TO RECEIVE THE COUNTY BONDS FOR ITS STOCK AND ULTRA VIRES OF THE COUNTY TO EXECUTE ITS BONDS FOR THE STOCK.

The execution of the Patrick county bonds to the Norfolk and Great Western Railroad Company was a transaction doubly obnoxious to legal objections.

The county was acting under the code of the State, which was the sole source of its authority, and the company under a charter in the acts of Assembly of 1866–'7, p. 608, and under the Code, which were the sole sources of its authority.

The company was limited to the receipt of land or money for its stock (see § 6 of its charter), and the county had no authority to subscribe for stock in anything but money, and none to execute its bonds unless for a loan to pay for it.

It was not the same thing or anything like the same thing for the county to swap bonds for stock, because such a transaction had a different effect and created entirely different relations from what the law contemplated.

It would put the county under a railroad influence and make the railroad a holder of its securities, and it *lost the assurance of raising the money to pay for the stock. It created the diversion of the bonds that actually occurred.*

Limited to paying a rate of six per cent. interest for a loan under the Virginia Code (chapter 141, § 4, p. 624, Code of

1860), two results would have followed obedience to the law:

> 1. The county would have borrowed money at par—that is, at six per cent. interest—and levied for quotas of stock as needful to pay the subscription or the loan.
>
> 2. The railroad company would have got the money and been thus enabled to do its work.

But when the bonds were diverted to the railroad company without any money being raised the door was opened for all manner of mischances.

As well said by Judge Dillon in his work on Municipal Corporations, § 108, third edition:

> "Thus under an act authorizing town officers to borrow money upon the credit of the town and to pay it over to a railroad corporation, to be expended by it 'in grading and constructing a railroad,' taking in exchange its stock at par, it is not within the power of municipal officers to make a direct exchange of the bonds of the town, even for an equal nominal amount of stock, as this leaves it in the power of the railroad corporation to sell such bonds at a discount."

How the County Justices of Patrick Disregarded the Law.

How the law was disregarded will appear upon examination of the Virginia statutes.

Chapter 61 of the Code of Virginia of 1860, which was in force in 1867, when the bonds in suit were executed, contains the full provisions of law respecting county subscriptions to railroads which are claimed to control this case.

Section 46, ch. 61, p. 364, of the Code (1860) provides how the county court may require polls to be opened and take the sense of the freeholders "whether the said court on behalf of the county shall subscribe to the stock of a railroad company incorporated to construct a railroad 'THROUGH, BY, OR NEAR' such county."

Section 47 prescribes the duties of the commissioners of election, and section 48 declares that if three-fifths of the freeholders be in favor of the subscription, the justices of the county court are to be summoned to attend a term of court to carry out the wishes of the people.

Then come sections 49 and 50, as follows:

> "Sec. 49. The acting justices, being summoned as directed in the preceding section and a majority being present, shall have power to determine what amount of the capital stock (not exceeding the maximum mentioned in section forty-six of this chapter) shall be subscribed for on behalf of such county, and shall enter of record the amount so agreed to be subscribed, and thereupon shall appoint an agent to make the subscription, to be paid in such installments as may be agreed upon by said court or as may be called for by said company.
>
> "Sec. 50. For the purpose of paying the quotas on said stock as they may be called for or the installments of such subscriptions as they may fall due, the court, at its term when such subscription shall be made, shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such county, and, at the term at which it makes its county levy, shall levy on all the lands and all other subjects liable to State tax and county levy in such county without the limits of a town that provides for its poor and keeps its streets in order, such tax to pay the amount of such subscription or of such loan or loans as may be authorized and the interest thereon, as said court may deem necessary and proper, and from year to year repeat such assessments until the subscription or loan made by such court, together with all interest, is fully paid; but such levy for a year shall not exceed one-fifth of the whole amount of such subscription."

Code of Virginia 1860, ch. 61.

It will be observed that the method of procedure required by sections 49 and 50 of the Code of Virginia, chapter 61, page 364, above quoted, is this:

1. *The county court must appoint an agent to subscribe to the stock.*

2. *The stock is to be paid for in such installments as may be agreed upon by the court or as may be called for by the company.*

3. *To pay the quotas or installments the court must appoint an agent to negotiate a loan or loans.*

4. *At the term at which it makes its county levy it must levy on all taxable property to pay the subscriptions or loans and interest thereon.*

5. *Tax assessments continue from year to year until the subscription or loan, with interest, is paid.*

6. *But in no year can the levy exceed one-fifth of the whole amount subscribed.*

Now, it will be also observed—

1. *That the county court never appointed any agent to negotiate any loan.*

2. *That no loan was, in fact, ever negotiated.*

3. *That the bonds were executed direct to the company for its stock, and in the name of the company.*

4. *That no levy was made at the term of court required by the code.*

5. *That the subscription was for* $200,000 *of stock and* $200,000 *of bonds were issued, and that at the time when the account was presented to the board of supervisors of Patrick county it called for over double the amount subscribed and asked payment or levy therefor, whereas the board were limited by law to levy for one-fifth of the whole amount subscribed.*

The board was obliged to disallow such account for three reasons:

1. *Because the bonds were void and their face showed it.*
2. *Because compound interest was demanded.*
3. *Because a levy beyond its powers to make was asked.*

The bonds were executed in violation of law—

1. *Because the Norfolk and Great Western Railroad Company could only take subscriptions to its stock in land or money.*
2. *Because the county could only execute its bonds for a loan, not for the stock.*
3. *All parties had notice of this from the statutes and the face of the bonds.*

IV.

AUTHORITIES SUPPORTING THE PROPOSITIONS THAT PATRICK COUNTY HAD NO AUTHORITY TO ISSUE ITS NEGOTIABLE (OR OTHER) BONDS TO THE NORFOLK AND GREAT WESTERN RAILROAD COMPANY.

The following propositions of law are sustained by the decisions of this court and by the general tenor of the jurisprudence of the country:

1. *That counties and the like municipal bodies must strictly pursue authority conferred in stock subscriptions.*
2. *That authority to subscribe for stock in a railroad company does not imply authority to execute negotiable securities.*
3. *That authority to a county to borrow money to pay for a subscription of stock is not authority to swap its bonds for the stock.*
4. *Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the Legislature has prescribed for the purpose of investing them with the power to act in the matter of stock subscriptions.*

This fourth proposition, held in McClure *vs.* Oxford (94 U. S., 432), would dispose of this case when applied to the facts, as the justices of Patrick county did dispense with "the essential forms of proceeding prescribed" and adopt another form, which proved fatal to the interests of the county; but there are recent cases in this Court which adjudge the very point in issue, and to them we turn:

Hill vs. *City of Memphis, Mo.*

An adjudication at this term of Court completely covers the case at bar.

In *Hill* vs. *City of Memphis, Missouri*, No. 68, October term, 1889, the suit was upon negotiable bonds with coupons attached, executed by Memphis City, Missouri, to the Missouri, Iowa, and Nebraska Railroad Company for stock in said Company.

The plaintiff relied on three statutes as authority for the execution of the bonds to the railroad company:

First. Upon the 14th section of the railroad's charter, which is as follows:

> "SEC. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed; and to take proper measures to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and (any) incorporated city, town, or incorporated company may subscribe to the stock to said railroad company and appoint an agent to represent its interests, give its vote, and receive its demands (dividends), and may take proper steps to guard and protect the interests in (of) such city, town, or corporation."

Second. Upon section 17 of the General Railroad Law, which is follows:

"SEC. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such county, city, or town in, or loan the credit thereof to, any railroad duly organized under this or any other law of the State, provided that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription." (G. S. of Mo., 338.)

And, *third*, he also relied upon the act of March 24, 1868, entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts," which was held inapplicable.

"*Be it enacted by the General Assembly of the State of Missouri as follows:*

"SECTION 1. That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company may, in payment of such subscriptions, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof.

"This act to take effect from and after its passage.

"Approved March 24, 1868."

It will be observed that Memphis City was given authority—

1. To subscribe to the stock of the railroad company.
2. To invest its county funds in the stock of said company.
3. To issue bonds to pay for the stock subscribed.
4. To appoint an agent to represent its interest, &c.
5. To loan its credit to the railroad company.

This Court, giving its opinion through Field, judge, held the bonds invalid, and said:

"The act of the Legislature of Missouri of February 9, 1857, to incorporate the Alexandria and Bloomfield Railroad Company, gives no authority to any town of the State to issue bonds for stock subscribed by it. The fourteenth section, which is the one upon which the plaintiff relies, empowers the county court of a county in which any part of the route of a railroad may lie to subscribe to stock of the company, to invest its funds in that stock, to issue the bonds of the county to raise the funds to pay for the stock thus subscribed, to take proper steps to protect the interest and credit of the county, and to appoint an agent to represent the county and receive its dividends. The same section also empowers any incorporated city or town to subscribe stock to such railroad and to appoint an agent to represent its interest, give its votes, and receive its dividends, and take proper steps to guard and protect its interest; but it does not authorize the town to issue any bonds for the stock thus subscribed. It leaves the town to provide for the payment of the stock in the ordinary way in which debts contracted by a town are met—that is, by funds arising from taxation. It is well settled that the power to subscribe for stock does not of itself include the power to issue bonds of a town in payment of it. All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law."

As to the inability of the county to issue negotiable paper the Court, continuing, said:

"Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value can be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this Court."

The principles and policy of the law were then expounded by the learned judge in terms so fitting to this case that we quote his opinion further, as follows:

"In *Police Jury* vs. *Britton* (15 Wall., 566) it was held that the trustees or representative officers of a parish, county, or other local jurisdiction in Louisiana, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, had no implied authority to issue negotiable securities for the purpose of raising money or funding a previous debt. Whilst the court did not insist that express authority is in all cases required for municipal bodies to issue negotiable paper, as such power may be implied from other express powers, it held that such implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. 'It is one thing,' said the court, 'for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated.

"In *Mayor* vs. *Ray* (19 Wall., 468, 475) the power of municipal bodies to issue negotiable paper for debts contracted by it was largely considered, and from the nature and the purposes of such municipalities it was held that they could not make such paper in the absence of express authorization. After speaking of municipal corporations as subordinate branches of the domestic government of a State, instituted for public purposes only, having none of the peculiar qualities or characteristics of trading corporations created for purposes of private gain except that of acting in a corporate capacity, the court said: 'Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors, but they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.' And again (p. 477): 'If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the Legislature can easily confer it under the proper limitations and restraints and with proper provisions for future repayment. Without such authority it cannot be legally exercised.'

"In *Claiborne Co.* vs. *Brooks* (111 U. S., 400, 406) this doctrine is reiterated and reaffirmed with emphasis. Said the court: 'Our opinion is that mere political bodies constituted as counties are, for the purpose of local policy and administration and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law or clearly implied from some other power expressly given which cannot be fairly exercised without it.' (See also *Kelly* vs. *Milan*, 127 U. S., 139; *Young* vs. *Clarendon Township*, 132 U. S., 340, 347.)

"The same doctrine prevails in Missouri. It follows that there was no authority in the town of Memphis to issue the bonds from which the coupons in suit are detached under the law referred to in the bonds as authorizing them."

Then the Court said:

"Nor can any authority for the issue of the bonds be derived from section 17 of the general railroad law of the State, which went into effect June 1, 1866. Though that section in terms empowers the trustees of an incorporated town to loan its credit to any railroad company organized under a law of the State, and the issue of its bonds to such company may be considered as a loan of its credit, it must be construed in subordination to the constitution of the State, which took effect the previous year, and prohibits the Legislature from authorizing any town to loan its credit to any corporation unless two-thirds of the qualified voters of the town at a regular or special election shall assent thereto."

This Case Stronger Than the One Cited.

The case at bar is more than covered by this adjudication in point.

The county of Patrick is not like the city of Memphis, but a municipal organization of less comprehensive powers.

But, like Memphis, its people had authorized the subscription to the stock, but not the issue of negotiable paper nor the issue of any paper to the railroad company.

The entire legislative scheme set forth in the statutes was ignored by the Patrick county judges, and the baneful results that followed serve to illustrate the wisdom of the decisions which require the municipal agencies to pursue strictly the authority given.

Scipio vs. *Wright.*

The case of *Scipio* vs. *Wright*, 101 U. S., 665 (1879), is also in point. There it appeared that a New York statute authorized towns to subscribe to stock in railroad companies and issue bonds for the purpose of borrowing money therefor. Instead of borrowing money the town supervisor issued certain bonds direct to the railroad commissioners, who endorsed the stock subscribed for as full paid, and sold the bonds, which were payable to bearer, to the plaintiff. It was held that the plaintiff could not recover.

Mr. Justice Strong, giving the opinion of the Court, said :

> "The statute prescribed the manner in which the power it conferred should be exercised. The town was at liberty to subscribe for stock, but if bonds were used to pay for it the mode of use was directed to be borrowing money with them and paying the money to the railroad company. It

is quite conceivable that the purpose of such a direction, instead of allowing an exchange of the bonds for the stock taken, was that the railroad company might obtain an amount of money equal to the amount of the bonds. This was important to the company, to the town as a stockholder, and to the public as interested in the projected railway. If the bonds might be delivered directly to the company in payment of the stock it might sell them at a discount. Thus it would fail to obtain the assistance in building its road which the Legislature contemplated it should have. Its stock would be practically sold for less than par, and it would not be worth as much to the town as it would be had all the money for which the bonds were given come into the company's treasury. Whether such were the motives that induced the peculiar phraseology of the statute or not, the highest court in New York has repeatedly construed it as prescribing the manner in which the bonds might be used or issued and as denying the power to exchange them directly with the railroad company for the stock taken by the town. These decisions have been constructions of the identical statute we have now under consideration and by which the bonds now in suit are alleged to have been issued. The construction given by the State court must therefore be our guide. Starin *vs.* The Town of Genoa (23 N. Y., 439) was a suit for interest upon town bonds made under the act. They had been exchanged with a railroad company for capital stock taken for the town, and the exchange was accompanied by the same agreement as that made between the town and company in the present case. The plaintiff was a purchaser from the railroad company with knowledge that it had received the bonds in payment of stock. In these respects the case was exactly like the present. The court of appeals ruled that issuing the bonds by exchanging them for the company's stock was not an execution of the power and authority granted by the statute, but an appropriation of them in a manner not contemplated by the Legislature or by the tax-payers' assent. The court said it was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or position that the credit merely of any town should be given through and by which money might be raised. They therefore held that the bonds were issued without authority, and, as the railroad company received them on a consideration not authorized, it was chargeable with a knowledge of their invalidity, and it never could have enforced them. It was further ruled that the plaintiff stood in no better position, that, having purchased with notice of the manner in which they had been issued, he was not a *bona fide* holder. Gould *vs.* The Town of Sterling (23 N. Y., 456) is a similar case and the ruling of the court was the same. In The People *vs.* Mead (24 *id.*, 114) we find a reassertion of the invalidity of bonds first negotiated by exchanging them for stock of the railroad company. The opinion was delivered by Denis, J. It was, however, said that a *bona fide* holder who had no knowledge that the railroad company had received the bonds in payment for the stock taken by the town would not be liable to the defense which existed against the railroad company.

"Horton *vs.* The Town of Thompson (71 *id.*, 513) is another case in which the court of appeals gave the same construction to another similar statute, holding that bonds exchanged for stock were unlawfully issued, and that a purchaser with knowledge that they had been thus issued could not enforce them.

"It thus appears to be the settled construction given by the courts of New York to the act under which the bonds now in suit were issued and to other similar acts that they do not authorize an exchange of bonds for shares of the capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such a disposition of the bonds was made by the town officers or railroad commissioners cannot recover in a suit brought upon them.

"We find no decision of the court of appeals that is in conflict with what was ruled in the cases we have cited or which weakens their authority, and as they are constructions of a State statute we are constrained to follow them. Gould *vs.* The Town of Oneonta (71 N. Y., 298), to which we have been referred, presented an entirely different question. A statute enacted in 1859 had authorized the transfer of the bonds directly to the railroad company in payment of the stock.

"Our conclusion, then, is that the circuit court erred in declining to instruct the jury as requested, substantially, that upon the facts proven in the case (and not contradicted) the plaintiff was not entitled to recover upon any of the seventeen bonds, because the supervisor and commissioners did not issue them for borrowed money, but transferred them to the railroad company in payment of the stock subscription."

Wells vs. *Supervisors.*

In *Wells* vs. *Supervisors*, 102 U. S., 625 (1880), it appeared that certain counties in Mississippi, amongst them the county of Pontotoc, were respectively authorized to subscribe to $200,000 of the stock of the Mississippi Central Railroad Company.

The county board of police were authorized to levy taxes to make good the subscription.

The railroad company was authorized to sell or hypothecate its own bonds, notes, &c., as well as bonds, notes, &c., received by it as donations or in subscriptions.

The board of supervisors of Pontotoc (succeeding the board of police), under authority of a popular vote, issued to the railroad company $150,000 of its bonds.

The United States Supreme Court held these bonds void, and Chief Justice Waite, giving its unanimous opinion, said :

> "The controlling question in this case is whether there was authority in law for issuing the bonds to which the coupons sued on were attached. If there was not it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms or by reasonable implication, no obligation of that kind can be created."

Further the Court said :

> "In Mississippi, as a general rule, the boards of supervisors of counties have no other financial powers than 'to levy such taxes as may be necessary to meet the demands of their respective counties' and to 'direct the appropriation of the money that may come into the treasury.' Code (1880),

sections 2148 and 2158; Code (1857), ch. 59, section 4, articles 16, 30. This, it has been held by the highest courts of the State, gives no power to borrow money. In Beaman *vs.* Leake County (42 Miss., 247), decided in 1868, the court, referring to an act then under consideration, passed in December, 1863, but which in no manner affects this case, said: 'The act just referred to is the only one of a general nature empowering boards of police to borrow money, and without some such act they could not lawfully do so in their official characters.' The policy of the State from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation, and in Hawkins *vs.* Carroll County (50 *id.*, 762) it was expressly declared that 'the grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed."

So in the case at bar. The justices of Patrick county had authority to appoint an agent to negotiate a loan. Their limited authority should have been strictly construed, and they could not extend or torture it into what they did.

Claiborne County vs. *Brooks.*

In *Claiborne County* vs. *Brooks* (111 U. S., 400) this Court held that the power which the statutes conferred on a county in Tennessee to erect a court-house, jail, and other necessary county buildings did not authorize the issue of commercial paper for a debt contracted for the construction of such a building. Mr. Justice Bradley, giving the unanimous opinion, said:

"Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law or clearly implied from some other power expressly given, which cannot be fairly exercised without it. Our views on this subject were distinctly expressed in the case of Police Jury *vs.* Britton (15 Wall., 566), where, speaking of the power of local political bodies to issue commercial paper, we said: It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give the proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the fraud that will be perpetrated. We do not mean to be understood that it requires in all cases express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express power granted. Thus it has been held that the power to borrow money implies the power to issue *the ordinary securities* FOR ITS REPAYMENT, whether in the form of notes or bonds payable in the future." (Pp. 571–'2.)

In that case the suit was brought on coupons of bonds given to take up certain levee warrants issued by the police jury of the parish, and the court were unanimously of opinion that the police jury had no power to issue such bonds.

The authority to borrow money implies the power to issue the ordinary securities FOR ITS REPAYMENT; but mark the limitation: Not for something else than REPAYMENT, but simply for REPAYMENT.

There being no borrowing in this case, there could be no bond for *repayment.*

Kelley vs. *Milan.*

In *Kelley* vs. *Milan*, 127 U. S., 129 (1887), certain negotiable bonds issued by the town of Milan, Tennessee, were held to have been issued without authority, and that a consent decree entered in a suit could not validate them.

Mr. Justice Blatchford, giving the opinion of the Court, said:

> "It is well settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the Legislature, and that *even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription* unless the power to issue such bonds is expressly or by reasonable implication conferred by statute. Such is the law as recognized by the supreme court of Tennessee in the case of Pulaski *vs.* Gilmore, decided in 1880 and published in 2 Fed. Rep., 870, and in Tax-payers of Milan *vs.* Tennessee Central Railroad, 11 Lea., 330, decided in 1883. Such is also the law as established by this Court. (Marsh *vs.* Fulton County, 10 Wall., 676; Wells *vs.* Supervisors, 102 U. S., 625; Ottawa *vs.* Casey, 108 U. S., 110, 123; Daviess County *vs.* Dickinson, 117 U. S., 657, 663.)"

Continuing, the Court said:

> "The grant of authority of a municipal corporation to subscribe for stock of a railroad company does not carry with it the authority to issue negotiable bonds to pay for the subscription, or anything more than the power to raise money by taxation to pay the amount of the subscription. If in the statute granting the power to subscribe for the stock no manner of paying the subscription is provided for, it cannot be paid by issuing negotiable bonds. The practice in Tennessee, as shown by the statute books, has been to authorize expressly the issuing of negotiable bonds to municipal corporations to pay for subscriptions in stock in all cases where it was desired to confer upon such corporations the power to issue such bonds."

V.

THE PLAINTIFFS HAD FULL NOTICE OF THE INVALIDITY OF THE BONDS.

The bonds are on their face payable to the "*Norfolk and Great Western Railroad Company or assigns.*"

The power of attorney to assign them is signed by the "president of the Norfolk and Great Western Railroad Company."

The plaintiffs bought them after interest on them was due and unpaid, and they were thus discredited, and knew from their face that they were issued without authority, as there was no statute in Virginia under which it was possible that Patrick county could legally issue negotiable or other securities to the Norfolk and Great Western Railroad Company.

The case of *Hill* vs. *City of Memphis*, already cited, applies on this point as on others; and authorities could be indefinitely cited, both of text-writers and courts, to the like effect.

As said by the Court in another case (*Ogden* vs. *Daviess County*, 102 U. S., 641), through Chief Justice Waite, giving its opinion:

> "We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. On the face of these it appears that they were issued to the Chicago and Southwestern Company on account of an election held by 'certain taxable inhabitants of the county.' This clearly connects the bonds with the Chicago and Southwestern charter and indicates unmistakably that they were put out on account of a 'strip' subscription. The holder is therefore chargeable with notice of the want of legal authority for their issue."

In Jones on Railroad Securities, § 297, it is said:

"When bonds purport to be issued under the authority of a statute referred to, but recite on their face facts inconsistent with the statute, they are not valid in the hands of any holder. Thus, when the act authorizing a loan provided that the bonds should be disposed of at not less than their par value, and the money invested in the stock of a railroad company, and the bonds referring to the act recited that they were issued 'for value received, in the stock of the Monticello and Port Jervis Railroad Company,' they showed upon their face that they were issued in violation of the act and therefore void."

The Patrick county bonds are inconsistent on their face with the Virginia Code because it authorized a loan, whereas the bonds were evidently not for a loan, as the Norfolk and Great Western Railroad Company could not lend.

They were also inconsistent with the Code, because that did not authorize negotiable (or other) bonds to be executed to any one.

VI.

THE BONDS WERE NOT NEGOTIABLE IN FACT AND ARE NOT NEGOTIABLE IN FORM; THE UNITED STATES CIRCUIT COURT HAD, THEREFORE, NO JURISDICTION OF THE CASE.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great if not controlling influence."

Topliff *vs.* Topliff, 122 U. S., 131.

In this suit the plaintiffs in error interpreted the paper sued on just as we insist it should be interpreted—as a non-negotiable instrument—by instituting the proceeding in the name of the "*Norfolk and Great Western Railroad Company,* *for the use of. Walter C. Gurnee, Jr., and Augustus C. Gurnee, &c., &c.*"

This is not the way that the holder of a paper negotiable by the law merchant proceeds. He sues in his own right.

The idea that this is a negotiable paper is an afterthought. Having interpreted the instrument themselves and started out properly, they cannot change front and make a claim antagonistic to their own understanding.

But, apart from this, let us ask:

> "*Whether or not a registered bond of the county of Patrick, in the State of Virginia, executed and delivered in Virginia to the Norfolk and Great Western Railroad Company, a corporation of Virginia, payable to it or assigns, in Virginia, and importing on its face that the assignment is to substitute the assignee in place of the assignor, is 'a promissory note negotiable by the law merchant' under the statutes and decisions of Virginia.*"

The statute of the United States which bears on the question is as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted to recover thereon if no assignment had been made, EXCEPT IN CASES OF PROMISSORY NOTES NEGOTIABLE BY THE LAW MERCHANT AND BILLS OF EXCHANGE." (Section 1, chap. 137, Sup. to Revised Statutes, p. 174.)

The registered bonds in suit are in form as follows (see Record, p. 29):

$1,000. COUNTY OF PATRICK. No. 13.

Stamp.

The county of Patrick, in the State of Virginia, hereby promises to pay to the Norfolk and Great Western Railroad Company or its assigns, twenty years from the twenty-sixth day of October, 1868, the sum of one thousand dollars, for value received, with interest thereon, at the rate of six per centum per annum, from the twenty-sixth day of October, 1868, the future interest payable semi-annually on the first day of May and the first day of November in each year.

State of Virginia.

Patrick County,
Va., Seal.

In testimony whereof the said county has caused its corporate seal to be hereto affixed, with the proper signature of the presiding justice, attested by the clerk, in accordance with the order of the county court of said county, this twenty-seventh day of August, 1869.

WM. WITT,
Presiding Justice.

J. L. ANGLIN, *Clerk.*

For value received the undersigned do- hereby irrevocably constitute and appoint —— —— attorney to sell, assign, and transfer unto —— —— — dollars of the registered bonds of the county of ——, with full power of substitution.

Witness — hand and seal this — day of ——, 18—.

THOS. S. FLOURNOY, [SEAL.]
Pres't N. & G. W. R. R. Co.

Witnesses:
EDWIN DE LEON.
J. D. IMBODEN.

The assignment and bond are all printed on the face of one sheet.

The Virginia statutes that bear on the subject and which were in force in 1869, when the paper in suit was executed, are (1) the statute which declares what instruments are negotiable and (2) the statute giving the assignee of non-negotiable instruments the right to sue in his own name under certain conditions.

The statute of negotiability is as follows:

> " Every promissory note or check for money payable (1) in this State (2) at a particular bank or (3) at a particular office thereof for discount and deposit (4) or at the place of business of a licensed broker and (5) every inland bill of exchange payable in this State shall be deemed negotiable."

The statute giving the assignees of non-negotiable instruments the right to sue in their own name is as follows:

> " The assignee of any bond, note, or writing not negotiable may maintain thereon any action in his own name which the original obligee or payee might have brought, but shall allow all just accounts not only against himself but against the assignor before the defendant had notice of the assignment."
>
> Code of Virginia of 1860, chap. 144, § 14, p. 583.

The statute of 3 and 4 Anne made promissory notes payable to order or bearer, " assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants," and gave the holder a right of action against " the person that indorsed the same in like manner as in cases of inland bills of exchange."

" That statute was never in force in Virginia." (Davis *vs.* Miller, 14 Grattan, 18; Moncure J. Catin *vs.* Lenox, 5 Rand., 31, 41; Norton *vs.* Rose, 2 Wash. Va., 233.)

On the contrary, statutory law has regulated what papers are negotiable and what papers are not, and the decisions of the supreme court of appeals of Virginia have promulgated the principles which attach to each variety of instrument.

The position of the defendant in error may be thus stated:

1. The registered bond in suit is a Virginia contract and must be governed by Virginia law.

2. It is not a promissory note negotiable by the law merchant.

3. If no assignment had been made the obligee could not have sued in the United States courts, being a resident of Virginia.

4. Therefore the assignee cannot sue in the United States courts.

Peculiarities of the Bond in Suit.

The bond in suit is a peculiar instrument. It bears no semblance to any of the varieties of instrument which are known as negotiable, and in Virginia, where it was made, it employed the terms which are usual in non-negotiable instruments and did not adopt any of the well-known terms of negotiable instruments. It could not have been intended to be "assignable or indorsable over" in like manner as bills of exchange by the name of the indorser being written on the back (*in dorso*), for it adopted another and peculiar form of assignability of which the law merchant knows nothing and which belongs to an entirely different system.

There is nothing about the instrument to suggest negotiability.

(1.) It is not payable to order or to bearer.

(2.) It is not payable at "a bank in Virginia," &c., as required by the Virginia statute for negotiability.

(3.) It uses the word "*assigns*," the common word of deeds, bonds, and "old field" notes, due bills, &c., and is not negotiable by the law merchant.

(4.) It contemplates assignment in broken amounts, as see the form of assignment annexed to the obligatory words.

(5.) It never contemplated any kind of indorsement according to the law merchant.

(6.) It has no interest coupons attached.

(7.) It is expressly non-negotiable by the terms of the Virginia statute.

(8.) It is non-negotiable by the Virginia decisions.

Originally, in its inception, non-negotiable it could not become negotiable by any after act, for, although a note originally negotiable may *lose* its negotiable quality, a note originally non-negotiable cannot *acquire* a negotiable quality. (*Brown* vs. *Hull*, 33 Grat.)

It is a Registered Bond.

(1.) *The bond describes itself on its face as a "registered bond,"* and was executed with that description on it and a part of it. Like the artist who wrote under his picture "*This is a horse,*" the county issuing this paper did not intend to leave a question in the mind of any person as to what kind of obligation it entered into, and it therefore printed on its face its name as well as its terms. "*Registered bond*" is its own account of itself.

It is true that these words, "*Registered bonds,*" appear in the form of assignment and *under*, not *over*, the signature and seal of the county emitting the instrument. This is immaterial.

Tiedeman says:

> "The signature may be put on any part of the paper—at the top as well as at the bottom, on the back as well as on the face." (Tiedeman on Commercial Paper, § 12*a*, and cases cited; Benjamin Chalmers' Digest, article 56, p. 63.)

Edwards says:

> "It is not necessary that either a bill or note should be *subscribed* in writing. It is enough if the name of the maker or drawer appears in the instrument." (Edwards on Bills and Notes, 3d Ed., § 143, p. 133.)

In Daniel on Negotiable Notes it is said:

> "It seems that the purport of the instrument is not only to be collected from the 'four corners,' but from 'the eight corners,' a memorandum on the back affecting its operation being regarded the same as if written on its face." (1 Daniel Neg. Inst's, § 151.)

In the present case the term descriptive of the instrument ("registered bond") is in the prepared and printed form for the assignment; but the assignment is not in ordinary form. It is one that describes *the thing* which it assigns; it is on *that thing*, and *that thing* is thus recognized by all as *the thing* which all denominate it.

The reason why it is immaterial where the signature of the maker of the instrument is written, whether on the back, face, top, or bottom, is that the signature, wherever it be, imports the attaching of the signer's liability for all the words within its eight corners which enter into its significance and define its meaning and effect. All words upon the instrument when it is emitted become his words by the act of his emitting it and as evidenced by his signature. If they describe his obligation they are a part of it and limit or enlarge it according to their terms.

(2.) *It Contemplates Assignment for Part of the Amount Called for.*—It will be observed also that a blank is left on the form of the assignment for the amount assigned to be filled in. This is because the registered bond contemplates a possible partial assignment. You cannot assign a part of a negotiable instrument. As is said in Daniel on Negotiable Instruments:

> "A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such." (1 Daniel on Negotiable Instruments § 668.)

But this registered bond, as is the case with registered bonds generally, contemplates the possible division of the investment and the transfer on the books of the sums called for to different persons, and thus the issue of new bonds to them according to the amounts that they are entitled to.

This scheme of the registered bond shows that it is not designed to be and is not negotiable "according to the law merchant."

VII.

BY DECISIONS OF THE SUPREME COURT OF APPEALS OF VIRGINIA SUCH INSTRUMENTS NOT NEGOTIABLE, WHETHER AS NOTE OR BOND.

As we have seen, the statutes of Virginia determine not only what notes shall be negotiable, but also some of the incidents of those not negotiable.

Upon the latter the assignee may sue *in his own name*, just as if they were negotiable; but then he must "allow all just accounts, not only against himself, but against the assignor before the defendant had notice of the assignment. (Code of Virginia, 1860, ch. 144, § 14, p. 583.)

To be negotiable in Virginia the note must be payable "in this State" (Virginia) and

1. *At a particular bank; or*
2. *At a particular office thereof for discount and deposit; or*
3. *At the place of business of a licensed broker.* (Code of 1860.)

Only such an instrument as is so payable is "a courier without luggage" in Virginia. It is the quality of the negotiable note to cast its burdens behind it, and it is subject "to none of the defenses which might have been made between the original or intervening parties against any one who acquired it in the usual course of business before maturity." (1 Daniel Neg. Insts., § 1.)

Now, it is well settled that the rights of the parties in regard to the security issued are to be determined according to the law of the State as judicially construed at the time when such security is issued. (County of Ralls *vs.* Douglas, 105 U. S., 732; Douglas *vs.* Pike County, 101 U. S., 687.)

In Virginia at the time the bonds in suit were issued (to wit, August 27, 1869) its supreme court had held:

1. That notes not payable at a particular bank are not negotiable.
2. That registered bonds are not negotiable.
3. That notes and bonds payable to "A or assigns" are not negotiable.

Thus in Freeman's Bank *vs.* Ruckman (16 Grat., 126) the note sued on was payable to "Emory Haughton & Co. or order," and was for a certain sum, payable at a fixed time. Here were the negotiable words—"or order;" but the supreme court of Virginia held the note not negotiable. Why? Because it was payable "at either of the banking-houses in Wheeling, Va.," and not at "a particular bank," &c. It did not seem to that court that simple contracts to pay certain sums at fixed times to "A or assigns" or to "A or order" either were negotiable when the paper on its face showed the contrary.

The decision of the supreme court of appeals of Virginia as to registered bonds is thus stated by Judge Hughes in his opinion in the Cronin case (4 Hughes, 529):

> "In the case of De Voss *vs.* Richmond (18 Grat., 338) the supreme court of appeals of Virginia made the same principle the basis of an important leading decision. It also declared the law as to bonds passing by mere assignment. It is to be observed that the bonds now in suit were not transferable by power of attorney for registration, but that the plaintiff, by erasures and interpolations in the powers of attorney attached to them, converted these powers into assignments. In respect to bonds as assigned, the Virginia

court of appeals, in the case of De Voss *vs.* Richmond, said: 'If the bonds had been made so as to pass by assignment merely each successive assignee would have taken only an equitable title, and the bonds in his hands would have been subject to the same defenses to which they would have been subject in the hands of any prior holder.' Indeed, this is elementary law. See the early cases of Sere *et al. vs.* Pitot, 6 Cranch, 332; Welch *vs.* Mandeville, 1 Wheat., 233, and S. C., 5 Wheat., 275; Spring *vs.* South Carolina Insurance Co., 8 Wheat., 269. As already remarked, modern cases to the same effect are too numerous to be cited."

At April term, 1868, the De Voss decision was rendered in Virginia—a year and a half before the Patrick county bonds were issued. So it is plain that their framers knew the law (or are chargeable with knowledge), and it is likely that they adopted the non-negotiable form to avoid the danger which but for this precaution might now menace them—that is, the danger of being bound to pay for a railroad and not get it.

VIII.

BY DECISIONS OF THE UNITED STATES COURTS IN VIRGINIA SUCH INSTRUMENTS NOT NEGOTIABLE.

There have been two decisions in Virginia by the United States courts on the question at issue. The one was in this case by Judges Bond and Paul in the circuit court for the western district of Virginia, and the other by Judge Hughes, of the eastern district of Virginia, in the case of *Cronin* vs. *Patrick County* (4 Hughes, 529). The Cronin case was upon one of the bonds of the same series as those in suit, and Judge Hughes reached the same conclusion that Judges Bond and Paul came to—that the bonds were not negotiable.

Judge Hughes in his opinion thus described the bond:

"It is under seal in the ordinary form of a single bill long used in Virginia. It is payable to the obligee or assignee, which latter is the old term used in bonds under seal."

Upon the question of negotiability he said:

"When there are no negotiable words in a bond and it is not made payable to order or bearer, but is made payable to assigns, the use of that word imports non-negotiability and is one of the distinguishing features of a bond intended to be non-negotiable. In Virginia it is usual, in order to find the negotiable character of a bond or promissory note, to make it payable at a particular bank or place of business. No such place is named in the bonds under suit here, and they are payable therefore at the county of Patrick. Being dated in Virginia, executed in Virginia, and payable in Virginia, they can have no other character or attribute than is given to them by the laws of Virginia, and they cannot therefore be affected by any custom obtaining in New York. Had they been made payable in New York, then a custom of New York might have affected them; it cannot otherwise."

Continuing and describing the difference between registered and non-registered bonds, he said:

"There are two classes of registered bonds known to the stock markets, essentially distinct in character and intended to be so. They are negotiable bonds and registered bonds. Those of the first class, the negotiable bonds, are made payable to some payee or his order, in which case they are transferable by indorsement and delivery, or they are made payable to payee or bearer or simply to bearer, in which case they are transferable by mere delivery. The other class, the registered bonds, are made payable to an obligee or his assigns, and they are only transferable by regular assignment on books of the obligor.

"The bonds of Patrick county now under suit are in the familiar form of the single bill, are executed under seal, and made payable to an obligee and 'assigns.' Although they are non-negotiable, there is nothing on the face of the bonds proper to indicate that they were put out as registered bonds and were intended by the county of Patrick to be transferred on books kept by the county for that purpose; but on the same sheet with each bond proper is an annex in the form of a power of attorney, signed by the president of the railroad company to which the bond is made payable and to which it was delivered, describing these bonds as 'registered bonds,' and in each case containing a blank to be filled with the name of an attorney empowered to transfer the bond from the railroad company to an assignee. This paper indicates the intention of the original parties to the bond and fixes its character to be a registered as distinguished from a negotiable bond. The plaintiff in this suit, in receiving the bond with this annexed paper, in the original form, received it as a 'registered bond.' It is true that he afterwards so erased words and filled up blanks as to have changed the character of the annexed paper from a power of attorney authorizing some agent to transfer the bond as a registered bond to himself into an assignment of the bond directly to himself; but this alteration could not obliterate the fact that the bond was originally issued as a registered bond.

"Independently, however, of this fact, the bond is non-negotiable, and the plaintiff holds it either as a registered bond or as a bond which has come to him by mere assignment."

A similar ruling obtains in Pennsylvania.

In *Bunting* vs. *Camden, &c., R. R. Co.* (81 Penn. St.) the bond of the Camden and Atlantic Railroad Company was payable to the obligee "*or assigns.*"

The court pointed out the difference between such a bond and one payable to bearer, and said:

"No doubt this bond was assignable at law so as to authorize the assignee to sue in his own name under the provisions of the act of May 28, 1715; and it is conceded that it might have been assigned in equity by a parol delivery, but then the action must be in the name of the obligee."

Even as to bonds of a corporation payable to bearer the court said they might be assignable by delivery and sued in the name of the holder.

"Such bonds," says Chief Justice Lewis, "are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange." (Carr *vs.* Le Fevre, 3 Casey, 413.)

IX.

BY DECISIONS OF UNITED STATES COURTS OUTSIDE OF VIRGINIA SUCH INSTRUMENTS NOT NEGOTIABLE.

In *Porter* vs. *City of Janesville* (3 Federal Reporter, 617) (1880) the bond of Janesville City, Wisconsin, which was sued on, was payable to a certain railroad company or its assignee. Held negotiable; but why? Because of the Wisconsin law, which, unlike that of Virginia, did not fix a peculiar and conflicting essential of negotiability.

The Court said:

> "The case of Gregg *vs.* Weston (7 Bissell, 360), denying the jurisdiction of this court, is not in conflict with his view, as that case turned upon the construction of the Indiana statute, which provides, in effect, that unless a note is made payable to order or bearer at a particular bank, whatever equity the maker is entitled to against the payee he may assert against any indorsee, which means, of course, that a note is not negotiable in that State unless payable to order or bearer at a bank.

"In such a case" (and the case at bar is similar) "it seems quite clear that an indorser could not derive jurisdiction to sue in the United States courts by assignment, as such a note is not negotiable by the law merchant."

The exact question here presented arose in Gregg *vs.* Weston (7 Bissell, 360).

In that case, as in this, the maker and the payee of the note were citizens of the same State—Indiana in that case, Virginia in this—and a citizen of another State sued upon it, claiming that the United States courts had jurisdiction, because, as alleged, it was a note negotiable by the law merchant. The note was payable to the payee "or order," and was therefore more closely assimilated to a note negotiable by the law merchant than is the note in suit, following the old form of payability to "assigns."

Judge Gresham, giving the opinion of the court, said:

> "In Indiana only notes payable to bearer or order at a bank in this State are negotiable as inland bills of exchange. The question is, What is meant by the words 'promissory notes negotiable by the law merchant' in the act of Congress? The plaintiff insists that Congress contemplated all promissory notes negotiable at common law or by the statute of Anne. I think Congress meant by this language notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker. The note sued on was given in Indiana and payable in Indiana, but not at a bank in this State; so that, by the law of Indiana, whatever equities the maker was entitled to as against the payee he may assert against any indorsee; that was the law of the contract. The statute of the State entered into and became a part of the note.
>
> "The statute already cited makes all promissory notes negotiable so far as to vest the property in each indorsee successively, but unless a note is made payable to order or bearer at a particular bank in this State it cannot be said to possess all the privileges or immunities of a note negotiable according to the law merchant. The statute of Anne has generally been adopted in this country, but has never been adopted in this State.
>
> "This opinion has been submitted to my brother Drummond, and he concurs therein.
>
> "The defendant's demurrer is sustained."

Every word of this opinion is applicable in Virginia. (Davis *vs.* Miller, 14 Grat., 18.)

Similar decisions have been rendered as to certificates of deposit in other States.

Thus in Alabama it is necessary to the negotiability of a note that it be payable "at a bank, private banking-house, or certain place of payment thereon designated." The supreme court of that State held that a certificate of deposit for money issued by a bank was not negotiable when made "payable on return of this certificate" and payable to "order," because not conforming to the essential statutory language of negotiability. (*Renfro* vs. *Merchants' Bank*, 45 Ala., 426.)

In Wisconsin, on the other hand, such certificates would be negotiable, because no such statutory provisions exist. (*Curran* vs. *Witter*, 65 Wisc., 16.)

X.

CUSTOM OR USAGE.

The plaintiffs in error have endeavored to aver themselves into the jurisdiction of the court by alleging the negotiability of the bonds sued on by custom or usage. This will not do. They lose sight of the very foundation of custom as an element of law. "The reason why a custom is allowed to be proved for the purpose of interpreting a contract is because both the parties are supposed to have been acquainted with it, and to have contracted in reference to it." (Caton, J., in Dixon *vs.* Dunham, 14 Ill., 314.) In this case no such custom as is averred could have been known to the parties, for they had before them a statute of the State that negatived its existence as to notes, and a supreme court of appeals decision which negatived it as to registered bonds. You cannot contradict a written instrument by proof of a custom, nor set aside or contradict a statute. Thus, it has been held that in an action against the drawer of a bill drawn in England and payable abroad it is inadmissible to prove a custom or usage amongst merchants to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the time he gave for the bill, there being a custom contradictory of the written bill. (Suse *vs.* Pompe, 8 C. B., N. S., 558.)

A custom or usage repugnant to a statutory enactment is absolutely void. (Coleman *vs.* McMurdo, 5 Rand, 51; Governor *vs.* Withers, 5 Grat., 24; Maury *vs.* Beekman, 9 Paige, 188; Masier *vs.* Harmon, 29 Ohio St., 220; Winter *vs.* U. S., Hempstead, 344; Delaplaine *vs.* Crenshaw, 15 Grat., 457.)

Where a statute provided that on all negotiable notes payable in future grace should be allowed, unless expressly stipulated to the contrary, a custom of banks not to allow them was held inadmissible in evidence. (Perkins *vs.* Franklin Bank, 21 Pick., 483—Shaw, C. J.)

Where a statute provides for bonds, contracts, and writings for payment of money to be assignable by endorsement, no custom can be shown to pass them by delivery. (Lehman *vs.* Marshall, 47 Ala., 362.)

" No usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the settled law of the State has adjudged them to be." (Bosworth, J., in Bargett *vs.* Orient Ins. Co., 3 Bosworth, 385.)

" No custom or usage can be allowed which repeals the law of the land." (Evans, J., in Smetz *vs.* Kennedy, Riley, 218.)

" Though usage is often resorted to for explanation of commercial instruments, it never is, nor ought to be, received to contradict a settled rule of commercial law." (Kent, C. J., in First *vs.* Barker, 2 Johns., 327.)

" The practice of the New York stock market, as testified by one of the witnesses, can have no weight on this question. We are to seek what was required by the grave and steady rule of law, not what would satisfy the eagerness of speculators grasping its object in one hand with bold temerity and parting with it on the other with suspicious haste.

"A mournful history tells us there were at that time on the stock market many practices which neither the law nor good morals could uphold." (Ewing, J., in McCourey *vs.* Suydam, 10 N. J. L. R., 245.)

" If the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." (Nelson, C. J., in Woodruff *vs.* Merchants' Bank, 25 Wendell, 673.)

XI.

THE DEMURRER TO THE DECLARATION.

The defendant in error craved oyer of the bonds, and demurred to the declaration in the circuit court for the western district of Virginia, as follows:

OYER CRAVED.

The defendant demands oyer and copy of all the bonds or writings obligatory and the conditions thereof mentioned in the declaration of the plaintiff and in each of the several counts thereof.

DEMURRER.

And the said defendant comes and defends the wrong or injury, and says that the declaration of the plaintiff and each count thereof and the matters therein contained in manner and form as the same are set forth are not sufficient in law for the said plaintiff to prove or maintain his aforesaid action against the defendant, and that the said defendant is not bound by law to answer the same. And this he is ready to verify. Wherefore, by reason of the insufficiency of the said declaration and of each count thereof, the defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action against the defendant.

(1.) *The demurrer goes to the jurisdiction of the court.*

It is well settled that an objection to the jurisdiction of the court may be made by motion to dismiss the suit or by demurrer, or by motion after verdict for arrest of judgment. (2 Abbott's Practice 55; Conkling's Treatise, 376; Lansing *vs.* Dolph, 4 Wash. C. C., 624; Shute *vs.* Davis, Peters' C. C., 431.)

Under the statute quoted in this case and repeated decisions of the Federal courts it is also well settled that if the action is brought by an assignee the declaration must affirmatively show that the assignor could have sued in the Federal courts if no assignment had been made, "except in cases of promissory notes *negotiable by the law merchant* and bill of exchange." (2 Abbott's Prac., 54; Montalet *vs.* Murray, 4 Cranch, 46; Bradley *vs.* Rhines, 8 Wall., 393; Sup. to Revised Statutes, p. 174.)

Quite clearly, then, as the Norfolk and Great Western Railroad Company was a Virginia corporation and could not itself have sued on these bonds in a Federal court, the holders of the bonds by assignment cannot themselves sue in such a court unless these bonds are "*promissory notes negotiable by the law merchant or bills of exchange.*"

We have shown that they are not, and hence the demurrer must be sustained.

(2.) *The demurrer goes to the misjoinder of parties and the improper removal of the case.*

Quite clearly, too, the demurrer brings up the misjoinder of parties in the suit which was removed—that is, the misjoinder of assignor and assignee, and to the improper removal of a case in which one of the coplaintiffs was a resident of the same State as the defendant.

(3.) *The demurrer goes to the compound interest claimed.*

It will be observed from the account filed and from the declaration alike that this proceeding is simply for interest and for interest on interest—that is to say, it is to recover $15,314.16 of interest on $17,000 of bonds, with interest compounded on the several installments that make up the $15,314.16 of interest; in all, aggregating $21,751.05, as of November 1st, 1883.

There is no pretense that there were any coupons for installments of interest, and there is no ground whatever for the claim of compound interest, which is never favored in law.

The rule in Virginia as to interest is stated in *Childers* vs. *Deane*, 4 Rand., 406—that is, that compound interest will not be allowed upon an agreement at the time of the loan that at the end of the year interest shall become principal; nor will it be allowed upon an agreement made after it is due that it shall bear interest previous to such maturity. Furthermore, it is held that if a mode of calculating interest be adopted which gives the creditor more than legal interest it will be usurious and avoid the contract. In 1869 an agreement to pay the compound interest now claimed was usurious and void, and forfeited both principal and interest.

See Code of Va. of 1860, ch. 141, § 45, p. 624.
See also Pindall *vs.* Bank of Marietta, 10 Leigh, 481.
Dunbar *vs.* Woodcock, 10 Leigh, 629.

Respectfully submitted,

JOHN W. DANIEL,
Attorney for Patrick County.